



Department of Law

Corporate Governance and Collective Bargaining

**A comparative study of the evolution of
Corporate Governance and Collective Bargaining in
France, Germany, UK and Portugal**

Volume II

Bruno Mestre

Thesis submitted for assessment with a view to obtaining the degree of
Doctor of Laws of the European University Institute

Florence, October 2009

European University Institute

Department of Law

Corporate Governance and Collective Bargaining

**A comparative study of the evolution of Corporate Governance and Collective
Bargaining in Germany, France, UK and Portugal
(Volume II)**

Bruno Mestre

Thesis submitted for assessment with a view to obtaining the degree of
Doctor of Laws

Examining Board

Prof. Marie-Ange Moreau (EUI - Supervisor)

Prof. Heike Schweitzer (EUI)

Prof. Julio Gomes (Universidade Católica Portuguesa - Porto)

Prof. Simon Deakin (University of Cambridge)

Part two - Rethinking the organisation of companies at the light of the national patterns of Corporate Governance and Employee Representation

Chapter 4

4.1. Introduction – distinct coalitions within a contractarian conception of the company

The preliminary part of this thesis enunciated that it would adopt a contractarian conception of the company, *i.e* a single contracting party, regulated to some extent by law, that coordinates the activities of suppliers of inputs and of consumers of products and services. The purpose of this chapter is to attempt to identify and describe the organisation of companies, the forms by which the relationships between the providers of capital, managers and workers have evolved through time. This chapter will depart from the assumption that the predominant patterns of Corporate Governance, Employee Representation and Collective Bargaining must be seen within the context of the organisation of companies: the concrete form by means of which each company decided to organise capital, management and labour must be seen within its due context. This chapter will consider that the bargain reached in each one of the “*contractual*” relationships that composes the firm obeys a certain logic and must be seen in context with the others; this implies that a change in one relationship will inevitably affect all the other relationships since all of them are devised to provide an answer to a specific need. This chapter focuses on the evolution in the organisation of companies and it is structured in the following form: the first part will attempt to explain what the organisation of a company is; the second part will proceed to attempt to describe the distinct models of production that have been experienced during the XXth century in Europe (craft production, Fordism and Post-fordism); the final part will present the

conclusion. The assumption underpinning this chapter is that the concrete organisation of a company depends of the macro-economic endowment, Corporate Governance and Employee Representation patterns in which it is active and must be seen in complementarity with the prevalent forms of corporate governance and employee representation.

4.2. The organisation of a company – distinct strategies for the coordination of the actions of the interest groups.

The organisation of a company depends upon the creation of a structure, a predetermined scheme destined to coordinate the actions of a number of individuals. The basic idea of an organisation consists in exerting control over the actions of individuals so as to conciliate them towards the production of a final result. Max Weber made extremely influential studies concerning the organisation of societies and asserted that “*bureaucratisation*” - in the sense of a functional organisation of persons and resources that did not depend on the force of some or the charisma of the leader - was the most efficient form of organisation of inputs. Weber analysed extensively the internal features of a functioning organisation and concluded that every organisation had four distinct characteristics: abstract rules, institutionalisation, formalisation and the alignment of the interests of the participants with the organisation. To put it briefly, abstraction this means that every organisation must be composed by a number of predetermined rules governing the admission of persons, the powers and duties that each person holds within it and the performance of work; institutionalisation means that there is a separation between the person holding the position and the position in itself, i.e the authority derives from the position and not from the person's personal charisma; formalisation means that each organisation must communicate and keep a number of written records that should work as a collective memory; finally, the alignment of interests means that the participants of the organisation should feel that the maximisation of their interests depends on the maximisation of the interests of the organisation. The basic idea behind these four characteristics can be traced to what economists name as the reduction of transaction costs: since the organisation had an enforceable pre-determined structure combining the actions of self-interested individuals, there would be no need to bargain permanently the best

interests of each one of them. The combination of these four characteristics should provide the foundations for the coordination of the actions of individuals to occur and the organisation to function and create value.³⁹⁵

The organisation that European companies adopted varied to a great extent in accordance with the concrete economic circumstances of the time. The following lines will attempt to defend the assumption that the organisation that companies adopted in terms of capital and labour was designed to the specific economic needs of the time; it will focus on the evolution that the structures of European companies underwent during the XXth century (craft production, Fordism and post-fordism) in particular as regards the relationships that they established with each one of their constituents (supply, labour and finance) and attempt to connect them to the general evolution in the economic conditions described earlier. The basic idea that is going to be defended throughout this chapter is that the evolutionary “*institutionalisation*” of the organisation of companies must be contextualised with the predominant patterns of Corporate Governance, Employee Representation and Collective Bargaining: firms were organised in such a form because the macro-economic environment demanded the existence of certain types of companies and the predominant patterns of Corporate Governance, Employee Representation and Collective Bargaining needed to organise in such a form as to coordinate the joint result of their inputs and provide an answer to the needs of the time. The patterns of organisation of companies allows capital and labour to organise themselves accordingly.

4.2.1 craft production - small companies

the first type of organisation of companies that prospered during the first half of the XXth century in Europe can be named as craft-production. Craft production refers to a method of organising companies in which productive structures are designed to be of no more than medium size (circa 100 workers) and producing for local and regional markets. Craft production bets on a very high degree of specialisation; its competitive advantage derives from the fact that it can compete in niche markets and produce products of a very high degree of quality, often customer tailored. It can easily adapt and readapt to the changing

³⁹⁵ DiMaggio, P., Ed. (2001). The Twenty-First Century Firm Oxford, Princeton University Press.

economic circumstances of the time and to the specific needs of customers. The internal organisation is entirely dependent of the guidance of the master of production. The master of production is itself an expert that guides the whole production process, from the purchase of the materials to the performance of work and the delivery of the final product.

The relationship of the company with its stakeholders is relatively unique: as regards the control over the supply, the company purchases its supplies from other craft producers, who often tailor their products to the specific needs of the producer. There is no sharp distinction between supplier and producer since the small size of the company and the small size of the markets in which they operate make them simultaneously suppliers and producers; they produce the supplies of other companies in a small network of production. The majority of firms specialize either in primary, intermediary or finished products; in a sense, each one of them produces a final product that, in turn, functions as a supply to the purchaser of the product. The greatest competitive advantage of the company here consists in specialisation; each company specialises in a certain niche market for which they provide added value. The coordination of the activities of the companies is left to the invisible hand of the market; the small size of companies and the specialised market in which they operate make it relatively easy for them to adapt to the winds of competition and quickly modify their production in accordance with the needs of the final consumer, who is normally another company operating in the next stage of the production chain in the market.

Its relationship with labour is often underpinned in personal ties and compromises. There is no scope for unionism outside the company or representation because the relationship of the employee with the employer is unique and personal. There is a high degree of dialogue within the company by means of direct conversations or on-the-job relationships. Each party knows that the personal relationships are the most important asset within the productive unit in order to ensure the alignment of interests of all parties with the success of the unit. The competitive advantage of this form of work organisation is connected to the special nature of the production; since firms operate in niche markets and the production is tailored to the specific needs of the customer, the employer must acquaint the employees with those needs in order for them to readapt and adjust to the specific needs of the market. Job

tenure is normally not very high but there is a high degree of circulation of craftsmen between firms of the market because the volatile structure of the market makes that the redundancy of one craft in a company can become the competitive advantage of another. These firms normally have training systems in which apprentices normally receive their training in one firm and then leave to work for another firm.

As regards the control over finances, craft production regimes are destined to become short-timed. There are usually two types of financing of the productive unit: either the owner of the unit invests its personal assets in it or it has resource to credit. In any case, the unit must deliver fast profit in order to ensure its financial stability. In the event that the owner is willing to invest its personal assets in the business, he will most likely intend to have a quick return of investment because the relatively volatile structure of the markets in which they operate does not create incentives for long-term commitments; in the event that the owner has resource to credit, banks will inevitably want to receive its loan quickly and the business will inevitably have to be run to pay for the loan and leave some profit for the owner. Therefore, craft production units are destined to be run in the short-term perspective.

Craft production has a number of advantages: firstly, the small-size of the company and the personal relationships between the employer and the employees ensure that there is easy dialogue and understanding between both parties; secondly, its small structure makes it easy to know exactly each person's position and its role in the productive process; thirdly, its relatively informal structure ensures a high degree of internal flexibility and dialogue between all stages of the productive process, making it easy to understand the functioning of the system as a whole and readapting the company to the fluctuations of the market; fourthly, it is relatively easy to align the interests of the craftsman with the employee on account of the personal relationships usually established between them; finally, the final result is usually unique and tailored to the specific needs of the customer. However, it also has its disadvantages: since there is no great degree of institutionalisation, normally the company is heavily dependent on the crafts of the concrete persons working in it; a modification of the concrete person holding the position will usually entail a modification to the internal dynamics of the company; the final product is also usually more expensive since the productive scale is smaller

and there is no room for economies of scale; finally, it is difficult to compete in terms of prices because the end product is usually unique and the competitive advantage lies in diversification. Therefore, it is easy to understand that craft production is an adequate productive structure for small markets and markets in which the competitive advantage does not lie in price but in diversification.³⁹⁶

4.2.2. Fordism – large vertically integrated units

The second stage of development of the organisation structure of companies came to be known as Fordism.³⁹⁷ Fordism consists in an organisational strategy that aims at creating mass production in large vertically integrated firms, on the basis of formal hierarchies, producing for mass markets. The greatest competitive advantage of this form of organisation consists in economies of scale achieved by a rigorous standardisation of all stages of the productive structure. There are a number of elements distinguishing a Fordist productive structure: firstly, there is a sharp division between management and labour in responsibilities and rewards: managers do the thinking and make the key decisions regarding long-range planning and setting of long-term goals; workers do the physical work necessary to implement the decisions of management. Secondly, work is structured around the principles of scientific management, with each job specified in an explicit description and tasks clearly differentiated across jobs. Work is organised around departments, with each department corresponding to a key business function (e.g: production, sales, R&D, human resources). Most workers and managers spent the entirety of their careers around a single organisational area. Managers were recruited from business schools, joining the company at the lower end of the management ladder and building their way up over the course of a career; workers were recruited usually young to unskilled positions and also build up their career on the blue-collar hierarchy. The way that the company ensured the alignment of interests of both managers and employees with the company consisted in job security; people were offered jobs for life in exchange for exclusive dedication; in order to prevent desertion, pay was connected to seniority and not merit; therefore there was no incentive to change firms since the increases in pay did

³⁹⁶ Ruigrok, W. and R. v. Tulder (1995). *The Logic of International Restructuring*, Routledge.

³⁹⁷ Ibid.

not depend on individual evaluations but on the number of years that the person spent in the company.³⁹⁸

It is also necessary to take into account the economic environment and the type of industry in which these companies competed. Fordism was an organisation structure that prospered under environments of demand side economic policies; in the USA, Fordist productive structures mushroomed around the country during the New Deal, in the hope that the large number of persons that they employed and the fact that these productive structures operated in key sectors of the economy would trigger the economic development; similarly in Europe, Fordism prospered during the time of coordinated capitalism having played an essential role in providing the inputs that European economies needed to develop themselves. Fordist productive structures also normally operated in regulated environments; Governments undertook efforts to ensure that their national champions would not be harmed by the chill winds of competition; entry costs were high and incumbent companies enjoyed preferential access to credit in order to finance their activities. It is interesting to observe that the majority of Fordist companies in Europe were involved in a number of conglomerates. A conglomerate consists in a method of organising companies in which the several departments of the company are often seemingly unrelated businesses. The greatest advantage of a conglomerate consists in the possibility to diversify risk and allocate capital from surplus businesses to needing businesses. They prospered in the 1950s and 1960s due to a combination of low interest rates and the protectionism of Governments, who saw those conglomerates as a means to provide the necessary inputs to the economic activity under the idea of demand side economics.³⁹⁹

As regards the control over the supply of inputs, Fordism is characterised by the vertical integration of all stages of the productive structure. This idea of governed by Coase's theorem, according to which the size of the firm is to be decided in accordance with the option to internalise the production

³⁹⁸ Powell, W. W. (2001). The Capitalist Firm in the Twenty-First Century: emerging patterns in western enterprise. The Twenty-First Century Firm: Changing Economic Organisation in International Perspective. P. DiMaggio, Princeton University Press.

³⁹⁹ Heidenreich, M. (1998). "Die organisation von Arbeit in der Wissensgesellschaft " Industrielle Beziehungen 5(1): 13-44, Morin, M.-L. (2005). "Labour Law and new forms of corporate organisation." International Labour Review 144(1): 5-30.

or to purchase it on the market.⁴⁰⁰ The option to control the supply of inputs in house is connected with the reduction of transaction costs and the control over the quality of the materials; if the firm expands its activities towards the supply of inputs, it will avoid having to pay the added value that the supplier would demand by its service and control the quality of the inputs, its quantity and delivery. In some firms - such as IBM - this is a vital component of its strategy since the quality of their products depends to a great extent on the quality of their inputs (in this case computer chips), which often have to be specifically designed in accordance with the needs of the consumer. But there are also a number of disadvantages connected with the vertical integration of inputs: firstly, the stock of components waiting to be used tends to be high, obliging the firm to invest in storage space and increasing the amount of time necessary to achieve the return of the investment in the integration; secondly, in-house production reduces the link with technology developments in other places; thirdly, in-house production is viable only for the supply of large quantities of materials being unsuited for small and occasional supplies. However, considering that the greatest competitive advantage of Fordism consists in economies of scale and the fact that, in Fordist Europe, the technology needed had all been licensed from the USA (reducing the need to invest in R&D) there were incentives for the vertical integration of companies in order to reach the highest economies of scale possible. This also explains the building up of conglomerates during the 1950s and 1960s.⁴⁰¹

As regards the control over the organisation of work, there is a connection between Fordism and the development of mass labour unions. The Fordist assembly lines put large numbers of homogeneous workers within one company under comparable working conditions and comparable wages. This enhances workers' ability to organise and bargain at company and sector levels. This explains why, in Europe, Fordism was most extensively implemented under the auspices of coordinated capitalism; in order to achieve the labour peace and wage moderation that the development of those companies demanded, workers were organised around sectoral unions and legislators undertook efforts to create governance mechanisms that could

⁴⁰⁰ Coase, R. (1937). "The Nature of the Firm." *Economica* 4(16): 384-405.

⁴⁰¹ Eichengreen, B. (2007). *The European Economy since 1945 - coordinated capitalism and beyond*. Princeton University Press.

prevent defection from isolated bargaining units. The need to ensure wage stability and the licensing of American mass production technology that provided the fuel for the development of European growth favoured the creation of mass labour unions destined to control the labour market. In some countries, unionisation was even made mandatory (such as in Portugal during the dictatorship) or strong incentives were created to achieve unionisation (such as granting trade unions with the task of managing training and unemployment funds) in order to control the free forces of the labour market. The idea was to moderate wages to ensure the retention of profits to finance further investment. The rigorous standardisation of all stages of the productive process, the large size of the plants, the extensive job tenure and the need to moderate wages also provided a most valuable field for collective bargaining to occur. The rigid hierarchy characteristic of fordist production regimes needed an extensive degree of abstraction, institutionalisation and formalisation; since the best way to ensure the implementation of these three main characteristics of large organisations consisted in direct dialogue with labour, collective agreements were seen as the ideal instruments for achieving this aim. Finally, Fordist assembly lines achieved the alignment of interests between the workers and the company by means of job tenure; there was a guarantee for job security; wages were connected with seniority and not productivity; there was a rigid internal hierarchy in which the progression was made by means of seniority on a full or quasi-automatic basis. Fordism favoured to a great degree unionisation and collective bargaining, especially at the level of the sector.⁴⁰²

The influence of Fordism was so extensive that it spilled towards small- and medium-sized companies. Even though the vast majority of workers were employed in small- and medium-sized companies, the influence of large fordist assembly units in the economic life was so overwhelming that the large company became the *de facto* dominant force in business culture. The dimension and power of the large corporation is nothing to be surprised at since its weight in national economies was absolutely intentional. These large assembly lines were destined to provide the remaining economy activity with the necessary inputs for its development and therefore the well-being of the economy depended on the well-being of these companies. The most interesting

⁴⁰² Ruigrok, W. and R. v. Tulder (1995). The Logic of International Restructuring, Routledge.

thing to observe was that its work practices also spread to small and medium companies always with due regard to their dimensions and specifications. Small and medium companies emulated the technique of scientific work organisation and long job tenures to ensure the alignment of interests between management and employees in their smaller units. Since labour costs were a very important competitive factor in these units aiming at small economies of scale, these small and medium companies gathered around sectoral employers' associations with the purpose of bargaining wages and the organisation of work with the trade unions. The spill-over of fordism into small and medium companies also provided an incentive for the building up of large sector-level trade unions since it provided both workers and employers with a means to control the unit labour costs and guarantee employment and decent working conditions around the smaller units of the sector. Therefore, Fordism also contributed to mass-unionism in small- and medium sized companies.

As regards the control over finance, the strategy of vertical integration has also been applied to the area of finances. Since their growth and development is based on the rise of production and consumption, they have from an early stage aimed at achieving a maximum degree of financial autonomy and the self-financing of activities. The idea behind coordinated capitalism was to moderate wages in order for firms to retain profits for reinvestment; this is nothing but the structure of growth that Fordist firms typically use. The connection between fordism and credit has limited itself to two different very specific areas: (1) consumer credit and (2) investment banking. As regards consumer credit, the economies in which fordist firms operate usually have generous consumer credit regimes in order to boost the consumption needed for firms to use their full productive capacity and generate the necessary profits for reinvestment. As regards the particular case of investment banking, which was widely used in Germany, it is not normally found in Fordist productive structures because the short-term horizons of investors are inadequate to the long-term perspectives that fordist productive units need to be profitable. The German case of investment banking was particular in this sense because the patient capital that they provided provided firms with the financial resources that they needed to finance their activities while ensuring an efficient monitoring mechanism of managers in order to

safeguard the long term objectives of the company. Therefore, Fordism is connected with long-term growth and perspectives.⁴⁰³

Fordism has a number of advantages and disadvantages; as regards the advantages, Fordism is ideal for the production of homogeneous goods, taking advantage of economies of scale and in which the greatest competitive factor is price. It is ideal for the production of consumer goods destined for mass-markets. As regards the disadvantages, it is vulnerable to the bargaining power of workers, it is unfit for diversification and competition in markets in which the competitive advantage lies not only in price but also on innovation and it is vulnerable to the fluctuations in the prices of inputs.

4.2.3. Post-Fordism

Fordism was an extremely influential method of work organisation that enjoys the unmistakable attribute of being capable of having established a before and an after. The main attributes of fordism consisted in (1) sharp division of tasks between management and workers and the workers themselves, (2) long job tenures and progression based on seniority, (3) vertical integration of all stages of the production procedure, (4) large labour unions and high degree of sector social dialogue; (5) competitive advantage based on economies of scale. The period that followed fordism attempted to recover the competitive advantage of craft production ((1) flexible structure, (2) easy adaptation to markets, (3) intense company-level social dialogue) without giving up on the merits of fordism. Post-fordism refers to a plethora of work processes that attempts to introduce the merits of craft production within fordist assembly units. But before analysing the characteristics of these methods of work there is a need to analyse the reasons for the decline in fordism.

(a) reasons for the decline in fordism – the reasons for the decline in fordism have been extensively analysed in the description of the evolution in the general economic conditions.⁴⁰⁴ This chapter intends to make a connection between those evolutions and the inadequacy of fordism to the new economic

⁴⁰³ Backhaus, J. G. (1999). Company Board Representation. The Elgar Companion to Law and Economics. J. G. Backhaus, Cheltenham.

⁴⁰⁴ Eichengreen, B. (2007). The European Economy since 1945 - coordinated capitalism and beyond. Princeton University Press.

conditions. The previous paragraph mentioned that fordism bets on a sharp division of tasks between management and labour according to which the former do the planning and the latter limit themselves to performing each stage of the productive process and in taking advantage of the economies of scale that the vertical integration of all stages of the productive process offers. In exchange for this division of tasks, the owners of the company offer job stability and internal labour markets; workers agree to moderate their wages in large sector level negotiations in exchange for reinvestment of profits in order to finance the expansion of the company towards other stages of the productive process.

The evolution in the general economical conditions from the 1970s onwards brought an end to this compromise. Firstly, rising input prices caused by the oil wars and the galloping wages caused a decline in profitability that jeopardised further expansion. Rising prices of inputs also put at stake the incentives for companies to integrate vertically. Companies suddenly saw themselves limited in their capacity to integrate vertically and were unable to proceed with their strategy of retention of profits and expansion. Secondly, companies had to deal with a decrease in the productivity of labour. This breakdown in productivity was caused not only by the rise in wages but also by the reduction in the capacity utilisation of existing technology. The technologies that fuelled mass-production had been licensed from previous investments made in the USA. They were designed towards achieving an ideal level of productivity, which had been reached and could no longer be supplanted. More productivity demanded radical innovation. Thirdly, companies had to face new competition from the Eastern-Asia countries, led by Japan. Japanese products were considered to be of high-quality and low price and western European products were unable to compete with their standards using the existing rules of the game. Finally, the general macro-economic structure, which had been underpinned on Keynesian standards, began to fail. Countries could no longer use the demand side of the economy and the tax system in order to foster continuous growth. They now had to deal with inflation and instability, which are highly detrimental to the fordist organisational structure because the long-term

planning the strategy of expansion that characterises it are underpinned on a forecast of stability in the prices of inputs and the demand.⁴⁰⁵

Similarly, the extensive wave of reforms undertaken during the late 1970s and 1980s were not kind to fordist production structures. The turn to free market policies undertaken by the majority of European governments had a pervasive effect on the pillars of fordism: state intervention in the economy, social dialogue and regulated markets in order to ensure the stability of incumbent companies. Since companies could no longer rely on the state to ensure the macro-economical stability necessary undertake long-term strategic planning of investment, on trade unions to achieve the moderation of wages to ensure the retention of profits and on regulation to protect their competitive position, they had to rethink their productive strategies towards more short-term horizons. The financialisation of the economy that sparkled during the 1980s intensified the role of the financial sector in the behaviour of companies, either by means of the stock market or by means of an enlargement of credit to companies, which influences its behaviour towards short-termism. Finally, the liberalisation program undertaken at the European level had a chilling effect on formerly nationally protected sectors and champions, forcing them to readapt to the chill winds of competition.

Therefore, it becomes easy to observe that the fordist production structures suddenly became inadequate to the sharp modification occurred from the 1970s onwards. Whereas before companies had to bet on expansion and on achieving economies of scale, now companies had to readapt to fluctuating markets and bet on innovation as the main competitive advantage.

(b) new work procedures – the exhaustion of the fordist method of organising work and the need to create new means of extracting value from workers and using labour as a competitive advantage in companies led to the development of new organisational logics. The organisational logic that gradually replaced fordism cannot be conducted to a single pattern since it encompasses a number of distinct procedures that are normally sector specific. The 1980s and 1990s witnessed the introduction within organisations of a number of distinct work procedures with names such as quality circles, just-on-time production,

⁴⁰⁵ Ibid.

continuous improvement processes and team-work just to name a few.⁴⁰⁶ These distinct procedures obey a common logic however: in the same way that the principles of economies of scale and sharp division of work oriented the organisation of fordist production structures, the new organisation of work was guided by the ideas of decentralisation of decision-making structures and the projectification of labour.

The decentralisation of decision-making structures referred to the progressive attenuation and elimination of hierarchies; it attempts to describe a movement of rearrangement of organisational structures according to which there is an increasing trend of competence sharing and delegation towards the lower levels of the organisational structure in the performance of work, putting at stake the sharp division of competences that characterised the fordist era. There are several types of decentralisation that can be configured in the following scheme:

(1) operational

b.1) parallel

b.2) true (entrepreneur model / self-organisation)

(2) strategic

Operational decentralisation refers to the movement of decentralisation within existing hierarchies; the fundamental structure of the company is not radically changed but merely rearranged so as to face the requirements of the new economical conditions. There are two distinct types of operational decentralisation that may be classified in accordance with the durability of the intervention: parallel decentralisation and true decentralisation. Parallel decentralisation refers to a situation in which the delegation and communication with the lower ranks of the company is limited to a number of specific tasks; it consists in timely and objectively limited decentralisation of the decision making structure towards a working group so as to improve the efficiency of that stage of the procedure. This represents a break-up with the fordist division of work; instead of taking the decision itself, the management of the company decides

⁴⁰⁶ Hunold, W. (1993). Lean Production: rechtsfragen bei der Einführung neuer arbeitsformen und techniken, C.H. Beck, Funder, M. (1999). Paradoxien der Reorganisation - eine empirische Studie strategischer Dezentralisierung von Konzernunternehmen und ihrer Auswirkungen auf Mitbestimmung und Industrielle Beziehungen, Rainer Hampp Verlag, Janning, F., Ed. (2002). Abschied von der Hierarchie - dezentralisierung in mittelständischen Unternehmen München und Meering, Rainer Hampp Verlag.

to enter into dialogue with the lower ranks of the company in order to collaborate with them by means of an agreement so as to increase the efficiency of that stage of the productive procedure. It consists in a sharing of competences, whereby the responsibility for the reform of the productive unit and the competence to take that decision are delegated towards the lower ranks (although not entirely). Since it does not alter fundamentally the pre-existing structure but rather completes it, it may be named as parallel decentralisation. It was designed to close the information gap that existed between the different stages of the productive procedure. True decentralisation represents a more advanced stage of decentralisation whereby the existing structure is generally and permanently modified; the vertical and horizontal division of competences are radically altered in accordance with the following principles: firstly, the decision-making competences are transferred from the indirect segments of production towards the operational segments; secondly, there is a reduction in the horizontal division of competences, with an emphasis on overlapping competences and team-work so as to reach the best result. The members of the operational unit themselves must reach the best working arrangement so as to maximise the efficiency of the unit. There are two types of true decentralisation, the self-organisational model and the entrepreneur model: within the self-organisational model the competences and responsibilities are transferred directly to continuous homogeneous groups, who accept these tasks in formal autonomy without any pre-determined functional division of tasks; within the entrepreneur model the competences and responsibilities are transferred to circles of specialists within their own competences; there is no formal division between direct and indirect tasks but merely an increase in the autonomy of each rank of the productive procedure by means of a boost in its competences.⁴⁰⁷

Strategic decentralisation consists in a more advanced mode of decentralisation that has been raising questions as to the boundaries of the firm. Strategic decentralisation consists in the involvement of firms in intricate contractual networks of collaborations with outsiders, who continuously assume the responsibility for performing some stages of the productive procedure of companies. The company itself concentrates on its core-competences whereas

⁴⁰⁷ Janning, F., Ed. (2002). Abschied von der Hierarchie - dezentralisierung in mittelständischen Unternehmen München und Meering, Rainer Hampp Verlag.

the non-core competences are outsourced towards other participants outside the company by means of a contractual arrangement. The company decides to contract out every non-essential part of its productive procedure from whoever provides the best result. There are a number of advantages of having resource to sub-contractors: firstly, the company does not have to undertake the necessary investments. The company merely has to expect the other to make the necessary investment and then purchase the final result of the investment; secondly, the company may benefit from the advantages of specialisation: subcontractors are usually companies who specialise in niche markets and then sell the results of their specialisation to the demanding large firms. Since the subcontractor is focused only on a niche market, the core company does not have to make investments in R&D or to be attentive to the evolution of the market in that specific stage of the production but merely to purchase the final result of a company which is completely concentrated on maximising its competences in the niche market. Since the relationship between the core company and the supplier is merely contractual, it may shift subcontractors as it deems fit to its best needs.⁴⁰⁸

Another feature of the post-fordist organisation of work consisted in the projectification of labour.⁴⁰⁹ The fordist system of production drew a line with the former craft-based system of production in dividing work in strictly divided tasks where the margin of autonomy of the worker was almost – if not entirely - absent and the same task was done repeatedly for days without end. The idea was for the worker to gain certain job-specific skills in order to perform its work more rapidly and contribute to the economies of scale that characterise fordism. Post-fordism has brought about the end of this scheme. Work is progressively being organised in short- and medium-term projects, with well-defined time horizons. Workers are continuously organised around production teams without any formal pre-existing structure or hierarchy and must organise themselves towards the fulfilment of a specific project. A process of iterated goal setting coordinates the activities of work teams. All the remaining

⁴⁰⁸ Funder, M. (1999). Paradoxien der Reorganisation - eine empirische Studie strategischer Dezentralisierung von Konzernunternehmungen und ihrer Auswirkungen auf Mitbestimmung und Industrielle Beziehungen, Rainer Hampp Verlag.

⁴⁰⁹ See the extremely interesting text of Ekstedt, E. (2007). A New Division of Labour: the "projectification" of working and industrial life.

members control the performance of each individual member of the team in order to prevent the taking advantage of the work of others (*peer-pressure*). This is a mechanism of self-control of the performance of work (rather than external control). This form of production integrates conception and execution as parallel tasks. The margin of autonomy that these teams have – when combined with the decentralisation of productive structures – is such that some of them may be almost characterised as independent firms. They may determine their own internal organisation, communicate horizontally within the organisation, build close collaborative relationships with the other participants of the productive process, adapting it to the best needs of the firm and the productive process and there is a high-degree of circulation of persons among teams, in order for the competences acquired in one team to be applied in other projects. Therefore, the organisation of work has progressively departed from strict hierarchical tasks performed by individuals constrained by rules and procedures towards a collective effort undertaken by a team with diverse skills, working with considerable discretion and judged on results and outcomes. The compartmentalisation of jobs has evolved towards the interdependence and involvement.⁴¹⁰

The way that these firms ensured the alignment of interests between workers and firms also contributed a great deal to the modification of the employment relationship. A report on the evolution of labour made by Fortune magazine in 1994 (13th June 1994, pp.44) describes the modifications occurred boldly:

“There will never be job security. You will be employed by us as long as you add value to the organisation, and you are continuously responsible for finding ways to add value. I return, you have the right to demand interesting and important work, the freedom and resources to perform it well, pay that reflects your contribution, and the experience and training needed to be employable here and elsewhere.”

It is easy to observe that this new logic represents a sharp-contrast with Fordism. Whereas in fordism, workers had the incentive to work and remain in the company in exchange for job security and pay connected with seniority, in post-fordism workers are encouraged to find autonomous ways to add value to the firms; their incentive to do so consists in pay in proportion to contribution

⁴¹⁰ Ibid.

(and not seniority) and skills that may be employed in other projects and with other employers.

The decentralisation and projectification brought about a sharp contrast with fordism. In a certain sense, one may say that they attempted to bring into large organisations the competitive advantages of craft production (specialisation, fluid hierarchies, easy adaptation).⁴¹¹ This change in the philosophy of work is connected with the modifications that occurred in the general economical conditions. The former paragraphs mentioned that the 1970s brought about with them a sharp decrease in the productivity of the workforce, which reduced the rhythm of accumulation. This meant that the traditional formula of extracting value from the workforce by means of a sharp division of tasks and the reduction in the autonomy of labour had been exhausted and new work methods needed to be implemented. The competition from new markets with low cost products also exhausted the possibility to reduce unit prices to achieve a competitive advantage; the competitive advantage of companies now needed to be underpinned in differentiation and added value; the company needed to bring about a contribution that distinguished it from its competitors and this reinforced the role of R&D in the strategy of companies. The general macro-economic structure also was modified to a great extent: whereas fordist companies normally operated in regulated markets and stable economies based on the balance of demand and taxation to sustain growth and avoid inflation, now companies had to operate in unstable markets based on the supply side of the economy and they were subject to the pressure of financial actors; this jeopardised their possibilities to maintain their old long-term strategies of growth through vertical integration and conquer of market shares. The decentralisation of labour relations and the projectification of labour were seen as the answer to these problems because they introduced the advantages of craft production in large assembly units: the delegation of decision-making power to the lower levels and the emphasis on short-termism that projectification brings with it allowed companies to better

⁴¹¹ Herkommer, S. (1996). Lean production: between myth and reality. Changing Europe: some aspects of identity, conflict and social justice. A. Erskine, M. Elchardus, S. Herkommer and J. Ryan, Avebury, Womack, J. P. and D. Jones (1996). Lean thinking: banish waste and create wealth in your corporation, Simon & Schuster.

readapt to the fluctuations of the market and allowed employees to bring about a positive contribution of their skills to the company.⁴¹²

(c) the reorganisation of companies – after having analysed the reasons for the decline in fordism and the labour strategies that companies adopted in order to cope with the new economic environment, it is not time to analyse the organisational structure that companies adopted in order to cope with the new times. The strategies that companies have been progressively adopting since the 1980s are manifold but they may be reconducted to the principles enumerated in two very influential works published in the 1980s: Peter and Waterman's "*In search of excellence*" and Alfred Rappaport's "*Shareholder value: the new standard for business performance*".⁴¹³ The following lines will attempt to describe their content and impact in its due place. In order to understand how companies managed to achieve these aims one needs to distinguish between large companies and small and medium sized companies.

(a) large companies - as regards large companies, post-fordism changed the structure of companies both internally and externally. The modifications occurred in the internal structure of companies were already sketched above: there was an increase in the decentralisation of decision-making power towards the lower ranks of the hierarchy and the reorganisation of work towards more participatory work procedures. It is only worthwhile noting the fundamental changes that this brought about to the structure of companies: firstly, there was a flattening of the hierarchy in terms of a decrease in the number of leading positions the compartmentalisation of labour. The division of labour became more fluid and horizontal, with the organisation of workers circulating around project-teams. Secondly, the participatory character of the new work procedure does not mean that employees were gifted with co-determination rights; the participatory character of the new organisation of work implies a greater degree of communication and understanding between the levels of the hierarchy and

⁴¹² Ekstedt, E. (2007). A New Division of Labour: the "projectification" of working and industrial life.

⁴¹³ Peters, T. J. and R. H. Waterman (1982). *In Search of Excellence* Profile Business, Rappaport, A. (1986). *Shareholder value - the new standard for business performance*. New York, The Free Press.

the different departments of the company; the emphasis is not so-much placed upon obtaining the consent of the other party to introduce a modification but in generating a climate of constant communication, flow of information, dialogue and understanding. The German language has a very expressive word to describe this dynamic: *Mitwirkung*, i.e. the co-influence on the conformation of the work. The idea is to generate constant dialogue and compromise and not antagonism in terms of a zero-sum game between management and rank and file. This obliges management and policy-makers to implement new forms of cooperation and participation of the workforce, the elevation of the qualification levels of the workforce in order to induce positive participation and the modification of the internal structure of companies in order to induce participation and encourage the expression of positive contributions to the work procedure. The innovations of the company are no longer introduced vertically but horizontally by means of medium-termed project teams and open processes of development of the product as it is being manufactured. The greatest resource of a company became its human resources and the capacity of the human factor to generate value.⁴¹⁴

The external structure of companies was also impressively modified. The main modifications occurred in accordance with two specific principles: the organisation around strategic business units and the rise of the networked company. The organisation of companies around strategic business units was heavily influenced by a managerial philosophy developed in the debut of the 1980s by Alfred Rappaport, which first introduced the idea of shareholder value. According to this very influential report, managers should divide the company into strategic business units and concentrate in extracting cash-flows to the shareholders from those same units. A strategic business unit consists in a division of the company gifted with a properly defined market, competing in an external market (as opposed to being an internal supplier) and being separable, distinct and identifiable. The management of the company should be fully decentralised towards the managers of those same units: the managers of each strategic business unit should be fully responsible for extracting value

⁴¹⁴ Helfert, M. (1992). "Betriebsverfassung, neue Rationalisierungsformen, lean production." WSI-Mitteilungen 8: 505-521.

from the unit constrained only by the overall corporate strategy.⁴¹⁵ In order for the managers to extract the greatest value of each strategic business unit, each unit should have a bias for action, stay close to the customer, have autonomy and entrepreneurship, bet on productivity through people, bet on value driven management, have a simple organisation and lean-staff, concentrate on core-activities and have autonomy in shop-floor. This change of managerial philosophy must be reconducted to the general movement of financialisation of the economy that occurred during the 1980s under the new philosophy of supply-side economics. Since companies were under a stronger pressure to compete they needed to deliver profits.⁴¹⁶

The organisation of the company around strategic business units considerably modified the structure of existing companies: firstly, post-fordism bet on the dismantling of the existing conglomerates. Considering that the building up of conglomerates was supported in a combination of low interest rates and protectionism, the new managerial philosophy considered that the company should rather concentrate in its core competences. Large holding companies then sold and dismantled the conglomerates that they had constructed and concentrated on their core businesses. Secondly, in order to reduce the risk and better define the markets in which they were active, large companies decided to split and build up groups of companies (*Konzern*). These groups of companies are not to be confused with conglomerates because the companies under a common control were companies in related businesses in which the managers could extract synergies from the coordination of their activities. Finally, many companies simply gave up producing ancillary products and decided to reduce their activities to their core competences: the company would identify its main activity, its strong arm and concentrate on developing that same activity while outsourcing the ancillary activities to a network of secondary firms.

This introduces the second great modification in the external structure of companies: the rise of the network company. The network company consists in a new method of organizing the company that is between markets and hierarchies: on the one hand there is no vertical integration such as fordism but

⁴¹⁵ Rappaport, A. (1986). Shareholder value - the new standard for business performance. New York, The Free Press.

⁴¹⁶ Peters, T. J. and R. H. Waterman (1982). In Search of Excellence Profile Business.

on the other hand the companies that are part of the network are not fully independent such as to be considered - at least economically – as purely independent contractors acting on an atomic basis within a market.⁴¹⁷ Networks consist in a distinct form of coordination and amalgamation of the activities of companies, whose specificity in the legal and economic plans raise several questions as regards the traditional assumptions of the limits of the firm. Traditionally, the legal and economic thinking about the limits of the firm was strongly influenced by the economic analysis undertaken by Coase, which determined the limit of the firm in accordance with the decision to internalise the product or service within the hierarchy or to contract it out on the market to an independent contractor. The network consists in a form of coordination of the activities of firms in which the aggregation of the activity of each distinct firm is not so deep as to configure a merger, acquisition or group relation – at least legally – but at the same time is sufficiently strong as to render the activities of each company partially or totally dependent of the other. This collaboration between companies may be accomplished by means of legal contracts (often by means of incomplete contracts – in the economic sense of the term – which are to be progressively fulfilled by means of legal contracts) or by means of the set up of a new organisation whose object is the coordination of the activities of companies. Networks may also be either paritary or hierarchical: a paritary network consists in a network of companies in which no member of the network enjoys a preponderant position in terms of influencing the governance of the other company; a hierarchical network consists in a network in which one or more members enjoy a preponderant position over the governance of the other company, either by means of an explicit contract or, more often, by means of the strong economic dependency of one party in relation to the other; this economic dependency does not amount to a group relation however, at least in the legal sense of the word: the legal system leaves empty an important regulatory space, build up of situations in which there is no contractual control in the technical sense but in which the power and information asymmetries have relevant effects over the hierarchy, the distribution of decision-making

⁴¹⁷ Williamson, O. E. (2003). "Examining economic organisation through the lens of contract." Industrial and Corporate Change 12: 917-942, Crouch, C. (2005). The place of networks in governance theory. Corporate Governance, Networks ed Innovazione. F. Cafaggi.

power and the relationships between companies and creditors.⁴¹⁸ The central task of the network consists in the ensuring the circulation of information between the companies that compose the network and reduce the scope for opportunistic behaviour of each company, ensuring the stability of the relationships established between the companies and that the behaviour of each individual company does not harm and other stakeholders.⁴¹⁹

There are several forms of coordination of the activities of companies by means of networks. The following lines will proceed to examine the most relevant ones for this study, which are: contractual models (outsourcing contracts and intellectual property rights contracts) and organisational models (bureaucratic contracts, proprietary contracts and hybrid contracts).

(1) contractual models – the contractual models of the network encompass a variety of situations in which the coordination of the activities of companies is achieved by means of contracts. Contracts, bilateral and multilateral, complete and incomplete, are the governance mechanism used to determine the rights and obligations of each party in the network and the means by which the coordination of the activities of companies is to be achieved. In order to understand the functioning of the contractual network one must begin by referring its main competitive advantage: the maintenance of the autonomy of the parties despite the establishment of a relationship of collaboration and the great degree of flexibility in the setting up of the rights and duties of the parties within the network. Since contracts are mechanisms underpinned in the private autonomy of the parties, they allow for a wide scope of flexibility in determining the mechanisms of collaboration and the prevention of opportunism. Contracts may be used for the setting up of both hierarchical and parity networks: the

⁴¹⁸ Normally, *subordination* was associated with *groups of companies* and *parity* was associated with *networks*. This distinction today has lost its significance because groups may be parity and there are phenomena of subordination that do not amount to a group relation. The Italian Civil Code and the Portuguese Company Code contain some very detailed regulations concerning the groups of companies. See, for Italy, Cafaggi, F. (2004). *Reti di imprese, spazi e silenzi regolativi. Reti di imprese tra regolazione e norme sociali. Nuove sfide per diritto ed economia*. F. Cafaggi. Bologna, Il Mulino., and, for Portugal, Engrácia Antunes, J. (2002). *Os Grupos de Sociedades*, Almedina.

⁴¹⁹ Cafaggi, F. (2004). Il governo della rete: modelli organizzativi del coordinamento inter-imprenditoriale. *Reti di imprese tra regolazione e norme sociali. Nuove sfide per diritto ed economia*. F. Cafaggi. Bologna, Il Mulino.

level of hierarchy is directly correlated to the concentration of directive power in the hands of one of the parties to the contract.

The organisation of the network by means of contracts may obey one of the following three schemes: linear schemes, radial schemes and mixed schemes. Linear networks consist in networks in which the several contracts composing the network are laid out sequentially, with each company being party to at least two contracts (with the exception of the extremes). Each company performs a part of the productive process and the failure of one company to perform its stage of the productive procedure will jeopardise the whole process because the sequential company will not be able to fill-in the gap. Radial networks resemble a star in which one company will act as the centre of the network and celebrate a number of contracts with distinct parties, who have no relationship to one another. The central company is the common party to all the contracts of the network (e.g: franchising). Mixed networks consist in networks that combine each one of these models; one can imagine a linear network in which one of the parties sets up a radial network in the middle of the procedure.⁴²⁰ All of these models refer to situations in which companies are in a relation of interdependence and in which the actions of one is liable to have externalities over the situation of others. Since contractual networks are characterised by a position of independence (at least legal) of each member of the network, this raises the question of the governance devices that one may use to prevent opportunistic behaviour. Although the question of the prevention of opportunism is common to any network, the problem is particularly serious in hierarchical networks, which are by definition networks characterised by a strong imbalance of power between the contracting parties. Unlike what happens in groups of companies, hierarchical network relations do not allow the dominating party to pursue its own self-interest at the expense of the contractually weaker party. There is a need to prevent that the discrepancy of economic power and the meagre residual control that the dependent company has left do not translate into abuses on the part of the dominating company, in the form of the reallocation of risk towards the dependent company. This could place serious problems to weaker constituencies, such as employees, creditors

⁴²⁰ Iamiceli, P. (2004). Le reti di imprese: modelli contrattuali di coordinamento. Reti di imprese tra regolazione e norme e sociali. F. Cafaggi, Il Mulino.

and minority shareholders, endangering the economic advantages of the network form.

The governance mechanisms that contractual networks may employ to prevent opportunist may be summarised in two large types: sanction mechanisms and reward mechanisms. Sanction mechanisms impose a penalty over the party that refuses to collaborate, making it incur on a loss that otherwise it would not have incurred. Penalty clauses (the ones that oblige the uncooperative party to pay a sum to the other that goes beyond the value of the loss incurred by the weaker party) exemplify these mechanisms. Reward mechanisms create incentives for collaborative behaviour. Instead of simply expecting the party to behave correspondingly, the contract attributes a premium to the party that best contributes to the success of the network. This is a mechanism designed to align the interests of the constituent parties with those of the network. An example may be, for instance, the distribution of profits in accordance with the success of the network. Since these mechanisms are contractual in nature, general contract law rules such as general clauses, good faith and remedies for breach of contract have a particular importance in this context.⁴²¹

Contractual networks have an inherent dialectic tension between flexibility and stability. The fact that the contract is by definition underpinned in the private autonomy of the parties, grants the network with a very high degree of flexibility, since the parties to the contract are gifted with an almost unrestricted margin of manoeuvre to develop their own mechanisms to prevent opportunism and pursue their own interests. This inherent flexibility is however in a dialectic tension with a tendentially lower degree of stability; although stability is an element of extreme importance in order to induce cooperation and allow for the amortization of the investments undertaken, it should not be confused with rigidity. Dense and inflexible contracts jeopardise the possibilities for further cooperation because there is the possibility that the parties will feel so burdened by rigid schemes of cooperation that they will manage the network towards more short-termism in order to avoid being trapped in the future. The stability that the network needs must be reconciliated with the possibility for the

⁴²¹ Cafaggi, F. (2004). Il governo della rete: modelli organizzativi del coordinamento inter-imprenditoriale. Reti di imprese tra regolazione e norme sociali. Nuove sfide per diritto ed economia. F. Cafaggi. Bologna, Il Mulino.

revision of the agreement in the event of a modification of circumstances. The contractual mechanisms for the prevention of the opportunistic behaviours that this possibility of revision opens consist in a high level of rigidity as for the objectives and scope pursued by the parties (normally by means of general clauses) and a high level of flexibility for the means to be achieved. Normally, these contracts provide for reflexive mechanisms of posterior bargaining of subsequent contracts that will complete the standard contract of cooperation in more short-term contracts. These contracts therefore should be gifted with a combination of declarations of intent and general clauses and decision-making mechanisms to render the contract more flexible during its performance.⁴²²

There are several types of contractual networks. The following lines will attempt to analyse here two very common types of contractual networks, outsourcing networks and associative networks. Their description will help us to comprehend the functioning of the network and the several control problems present within the network.

Outsourcing contracts consist in an the operation whereby a company trusts to another company the task of executing, on her behalf and in accordance with a pre-established set of instructions, a part of it productive process, maintaining the final economic responsibility for the result.⁴²³ In sharp contrast to the ideas of vertical integration in order to reduce costs by sparing the profit margin of the intermediary, post-fordism bet on the concentration in core-activities and on the contracting out of every non-essential part of the production. Initially, the main idea behind outsourcing was to combine the advantages of craft-production and fordism: a company would specialise in producing a specific product that could function as an input for another company (being thus an intermediary step in a productive procedure), with the possibility – if necessary – to produce it in large scale. Since the company would be focused merely on the production of that particular product, this would allow both the achievement of economies of scale as well as of a high quality of the final product. Outsourcing then spread to all sectors of the economic activity, with the increasing externalisation of ancillary activities that used to be

⁴²² Iamiceli, P. (2004). Le reti di imprese: modelli contrattuali di coordinamento. Reti di imprese tra regolazione e norme e sociali. F. Cafaggi, Il Mulino.

⁴²³ Morin, M.-L. (1994). "Sous-traitance et relations salariales. Aspects de droit du travail." Travail et Emploi 60(3): 23-43.

performed within the company, such as mensae, cleaning services, accounting, systems' administration, etc. To the gaudy of the contractualist theorists of the firm, companies increasingly resembled more bundles of contracts than proper organisations.⁴²⁴

Outsourcing obeys to the principle of rationalisation: the bundle of companies that are in a contractual relation of interdependence (whether symmetrical or hierarchical) with the contracting company should be capable of providing for a set of functions to provide and control the elementary pieces, the assembly and sub-assemblies of the final product. This transfer of competences to the contracted companies increases to a great extent the technical and economical responsibility of the contracted companies in the productive process. This renders necessary a contractual policy that guarantees the contracted companies participation in the whole or in the part of the programs to allow them to extract profit from the necessary investments. There are three distinct forms of outsourcing: global outsourcing, global production outsourcing and systematic outsourcing. Global outsourcing consists in a production logic whereby a contractor has full responsibility for the duration of a program, both the project and the execution; global production outsourcing consists in an operation whereby the principal makes the projects and then contracts the execution to the sub-contractor; systematic outsourcing is normally used in small and medium companies and consists in the subcontracting of small components or services of a very specialised nature to the subcontractor and its application and assembly within the principal company. These different forms of outsourcing possess a definite partnership dimension; they are accompanied with so strong demands of competitiveness over prices and technicality that they are bound to have important consequences over the investments, management of the production and of the staff of the sub-contractor company. This renders the sub-contracting companies highly competitive because they know that if they do not correspond to the demands of the principal company they will not see their contract renovated. This is in accordance with the logic of projectification, decentralisation and autonomy of each productive unit mentioned above on occasion of the analysis of the work procedures: although the subcontractor

⁴²⁴ Teubner, G. (2004). Netzwerk als Vertragsverbund, Nomos.

works for the principal, it retains full-autonomy over the methods to achieve the demands of the principal.⁴²⁵

Outsourcing relations are characterised by the autonomy – at least formal – of the sub-contractor in relation to the principal. Sub-contractors are even normally so keen in maintaining this autonomy that they developed three distinct strategies in order to reinforce their position vis-à-vis the principals: firstly, they diversified the principals, in order to avoid being extremely dependent of one principal; secondly, they developed their own products, which allows them to retain a certain degree of know-how and compete autonomously in international markets; thirdly, they decided to outsource themselves some of their operations. This did not avoid however, that the outsourcing operations be often characterised by a high degree of asymmetry and dependence of the sub-contractor in relation to the principal: some markets are characterised by a sharp atomisation and high degree of competitiveness of the sub-contractors in relation to the principals; also, the obligation of result pending upon the sub-contractor often provides full control of the relation to the principal. This raises the question of risk-allocation and opportunism: how are we to avoid that principals use outsourcing agreements in order to avoid labour protection and transfer the company risk to the subcontractor; and how are we to avoid that the principal await the subcontractor to make the necessary investments and then rip the profits of the investment without giving a chance to the sub-contractor to amortize its investment? This raises some very complicated governance problems because the subcontractor is de facto run in accordance with the interests of the principal, disregarding the interests of minority shareholders, creditors and employees.⁴²⁶ Contractual governance mechanisms are normally inefficient to fight this given the disparity of the bargaining position of the parties; the only result is legislative intervention such as the one that occurred in Italy with the *Legge 192/98*, which contains a

⁴²⁵ Morin, M.-L. (1994). "Sous-traitance et relations salariales. Aspects de droit du travail." *Travail et Emploi* 60(3): 23-43.

⁴²⁶ Arvidsson, N. (2006). Global strategies of multinational corporations. *Agire research papers*, Allertz, W. (2007). Cross-border organisation development and its consequences for industrial relations. *Agire research papers*.

general clause prohibiting the abuse of the economic dependence of the subcontractor.⁴²⁷

Associative networks consist in the second type of contractual network. This category comprehends all contracts through which the companies operating in the network regulate the exercise of their autonomy and coordinate it towards the achievement of common interests. They may be regulatory contracts (e.g: codes of conduct), cooperative contracts (e.g: consortia, strategic alliances, partnerships) or distributional contracts (e.g: agency, franchising, licensing). The determining feature of these contracts consists in the setting up of a tendential long-term relation between the companies. Unlike what happens in outsourcing contracts, in which a company subcontracts a part of its productive procedure to another, in associative networks the two companies have a very precise object, which is coordinated towards a common interest.

These contracts have an inherent tension between a transactional and a relational character. A contract is said to have a transactional character when its object consists in a trade between two parties (e.g: a licensing contract, in which a company pays to use a technology); it is said to have a relational character when its object consists in the establishment of a relationship between the parties that might lead to letter transactional contracts (e.g: partnerships). This is normally correlated to the structure of the market and the position of the parties: if the market is highly competitive and the parties are developing complementary activities, the contracts tend to be more relational; if the market allows for a certain lassitude and the parties are competing then the contracts tend to be more transactional. The more a contract tends to be relational, the more incomplete it tends to be. This raises the question of the prevention of opportunism and the tension between flexibility and stability that I mentioned in the former paragraph. These points have a particular significance in relational contracts.

These networks have a particular relevance today as relates to the question of know-how. Since technology and know-how are the main competitive advantages of modern companies, it is no wonder that it is increasingly becoming the object of relation between companies. A study

⁴²⁷ Iamiceli, P. (2004). Le reti di imprese: modelli contrattuali di coordinamento. Reti di imprese tra regolazione e norme e sociali. F. Cafaggi, Il Mulino.

undertaken by Bessy and Brousseau has attempted to devise a typology of these contracts. According to these authors, contracts relating to the transfer of know-how could be characterised in the following categories: (1) transactional technology licensing agreements (TLA), (2) one-shot complete transfer, (3) relational commercial TLA, (4) development TLA and (5) relational TLA.⁴²⁸ The first have as their object the simple transfer of a right; the second have as their object the transfer of the right to use a technology by a limited period of time; the third have as their object the transfer of the right to develop an existing technology; the fourth have as their object the right to develop an existing technology with the obligation to develop with the former company the profits to be ripped from the development; the fifth have as their object the allocation of several resources over a long period of time. It becomes easy to observe that there is a crescendo of interdependence between the companies, with the first contract being strictly transactional and the latter being strictly relational. There is a gradual increase of the level of interdependence between the companies as to the level of complementarity of the resources in relation to the others present in the company. Companies become gradually more dependent and their actions are liable to have externalities over the other. This raises the omnipresent question of the internal governance of the network.⁴²⁹

(2) organisational models - in contrast to what happens in contractual networks, organisational networks give rise to the setting up of a new entity designed to coordinate the activities of the companies. Organisational networks may be either hierarchical or paritary and the presence of a new entity to coordinate the activities of companies does not necessarily give rise to the setting up of a group relation. Organisational networks go beyond contractual networks in the sense that the setting up of a new entity gives rise to a more stable governance system, ideally suited to the coordination of long-term relationships. The entity set up for the governance of the network most often has a purely regulatory function, destined to safeguard a collective interest of the firms that compose the network. An example could be an entity set up for

⁴²⁸ Bessy, C. and E. Brousseau (1998). "Technology licensing contracts. Features and diversity." *International Review of Law and Economics* **18**(4): 451-489.

⁴²⁹ Iamiceli, P. (2004). Le reti di imprese: modelli contrattuali di coordinamento. *Reti di imprese tra regolazione e norme e sociali*. F. Cafaggi, Il Mulino.

the certification of the quality of a certain product: although each company produces the product individually, the certification of quality ensures a collective reputation that benefits all the companies that are part of the network. The distinguishing feature of the organisational network consists in the fact that the partners of the company whose object consists in the coordination of the activities of companies are themselves the companies whose activity is coordinated.

The application of the organisational model for the governance of the network gives rise to specific governance problems connected to the several relations established within the network. The main agency problems that occur within the organisational network structure can be condensed in two large groups: (1) between the majority shareholders of each company that composes the network and the administrators of the network and (2) between the minority shareholders of each company that composes the network and the administrators of those companies. The reasons for these agency problems are easy to guess: as regards the first group, the majority shareholders of each company will want the administrators of the network to manage the network on their interest; as regards the second group, the minority shareholders are in a delicate position because the administrators of those companies are at the hand of the majority shareholders and tend to influence the governance of the network at the interest of those majority shareholders. Each organisational network must provide an answer to these specific agency problems in order to avoid that the network falls prey to the majority shareholders' powers.⁴³⁰

There are three types of organisational networks: social, bureaucratic and proprietary. Each one of them has distinguishing features that provide an answer to the agency problems mentioned beforehand. There is also the possibility to have a combination of the characteristics of each one of these networks, giving rise to hybrid networks.⁴³¹

Social networks consist in a type of organisational network underpinned in informal, direct and interpersonal bonds. Social networks are usually set up

⁴³⁰ Cafaggi, F. (2004). Il governo della rete: modelli organizzativi del coordinamento inter-imprenditoriale. Reti di imprese tra regolazione e norme sociali. Nuove sfide per diritto ed economia. F. Cafaggi. Bologna, Il Mulino.

⁴³¹ See the excellent study of Zorzi, A. (2004). Reti di imprese e modelli societari di coordinamento. Reti di imprese tra regolazione e norme sociali. F. Cafaggi, Il Mulino. for this matter.

in environments in which the possibilities of opportunism are low and are characterised by a high level of trust. The sanctions against opportunistic behaviour are essentially reputational, which might provide a very strong deterrence mechanism because the personal bonds that connect the persons part of the network may break up easily in the presence of opportunistic behaviour. The main example of these social networks consists in interlocking directorates. Interlocking directorates refer to a situation in which there is the presence of one alien administrator in the board of another company. They may be direct, indirect or reciprocal: in direct interlocking directorates, one administrator sits at the boards of two companies; in indirect directorates, two administrators of distinct companies sit at the board of a third company; in reciprocal directorates, each management board of the networked companies appoints one or more of its members to sit in the management board of the other company. Interlocking directorates are a very effective system to set up a bond between two companies because the mix of the members of the management boards ensures an easier flow of information between the companies and facilitates the coordination of their activities. It facilitates collusive behaviours. Empirical research has highlighted that interlocking directorates are particularly apt for situations of dependency of resources: for instance, when a company requests credit from another, the company providing the credit may introduce a member in the management board in order to control the application of the money; or when two companies collude to gain a specific contract, they may set up a reciprocal interlocking directorate in order to prevent opportunistic behaviours during the performance of the contract.⁴³²

Bureaucratic networks correspond to a foundational logic in which the companies, although having diverse interests, agree to submit to common rules and procedures for the distribution of resources. This implies a structure with a certain degree of formalisation when the number of actors to coordinate is relevant. The choice of the organisational model should take into account that these networks have an interest in aggregating the biggest possible number of subjects. They are destined to provide an answer to collective action problems,

⁴³² Ibid, Erzegovesi, L. (2004). Soluzioni di rete per la finanzia delle piccole e medie imprese. Reti di imprese tra regolazine e norme sociali. Nuove sfide per diritto ed economia. F. Cafaggi, Il Mulino, Cafaggi, F. and P. Iamiceli (2007). Le reti di picolle e medie imprese tra proprietà familiare e nuovi scenari finanziari. Reti di impresa tr crescita e innovazione organizzativa. F. Cafaggi and P. Iamiceli, Il Mulino.

by establishing specific governance features for the attainment of a common objective. The most common type of bureaucratic networks consists in consortial networks. A consortium consists in an instrument of coordination between companies whereby two or more companies coordinate their activities to the attainment of a specific undertaking, normally demanding very specific and technical expertises.⁴³³ It is a very flexible instrument of coordination that corresponds to a variety of needs. A consortium may be used, for instance, for (1) the attainment of economies of scale (distribution networks, R&D), (2) reinforcement of the market power, (3) control of a market, (4) control of the quality of the products of the members of the consortium, among others. The most common uses of the consortium may be classified in two large groups: (a) the reaching of economies of scale or an increase in the reach of action or (b) the aggregation of means for the promotion of innovation. The consortium might have two distinct forms: (1) it may consist in a simple agreement between the parties (giving rise to a contractual network) or (2) it may consist in the setting up of a company to manage the consortium (giving rise to an organisational network). The second type is preferred when the companies wish to develop a long term relationship because it has two great advantages: firstly, it has a stable internal governance mechanism, consisting in the company law rules to which the companies are subject; secondly, it acts as a lock-in device, preventing opportunistic behaviours. The consortium is a very appreciated instrument of coordination because it may give rise either to contractual or to organisational networks and it provides the parties with a large degree of flexibility in the choice of the most appropriate organisational form (a foundation, a private company, a public company, a partnership) that best suits its needs.

Proprietary networks consist in models of coordination that act by means of a co-division of the resources and the residual results of their enjoyment. They are appropriate for those situations in which the parties must make investments towards a common end and there is a high risk of opportunism. They are often used in the development of innovative activities, of high technological content and with a high degree of insecurity in relation to the

⁴³³ For the readers of Portuguese see Sousa de Vasconcelos, P. (1999). O contrato de consórcio - no âmbito dos contratos de cooperação entre empresas. Coimbra Coimbra Editora.

results. There is a collusive logic here and the division of property seems to be the most adequate instrument to perform the interests of the parties. Proprietary networks may be designed either for the solution of transactional problems or collective action problems: the most adequate instrument for the solution of transaction problems is the venture capital; the most appropriate instrument for the solution of collective action problems is the joint venture.

Venture capital consists in an organisational form of the coordination of the activities of companies designed to the financing of young companies with a high growth potential. Venture capital is usually made by means of professional investors (venture capitalists), who collect funds from private parties and institutional investors in order to reinvest them in sectors of high potential of growth and high risk. The investment is made with a view to obtaining a return consisting in the allocation of intellectual property rights over the company and the results of the research. It is the most adequate means of financing in a context in which none of the parties knows beforehand the profits to be gathered from the investment, the relevance of the other contributions and it is difficult to monitor and control the quality and quantity of the performance of the other part. These are situations characterised by strong informational asymmetries and a high risk of opportunistic behaviour, giving rise to high agency costs. Venture capital consists in an organisational form of coordination because it presupposes a certain degree of collaboration between the companies in the attainment of the objective. The financier does not simply put its capital at risk, it also controls the application of the capital and gathers profit from its investment not only by means of the profits of the financed company but also by licensing the intellectual property rights arising from the innovation and participating in the exploration of the results of the research. It is usually made by means of a foundation set up between the financier and the financed. The professional investor is compensated for choosing the activity in which to invest, monitoring the recipient of the finance and participating in the management of the venture-backed company. Therefore, the venture capitalist is not simply a mere provider of finance; it also collaborates actively in the attainment of the desired result by offering management and commercial consultation to the financed company; it also reserves to himself large powers of control and active administration in the common company in order to condition its action in the best interests of the providers of finance. The entire

operation is structured in such a way as to stimulate cooperative behaviour between the parties: although the manager of the venture backed company normally has the right to manage the company in its best interest, the venture capitalist has large supervisory powers, reserving to himself a number of mechanisms to serve the interests of the providers of finance. These are mechanisms to reduce agency costs and may consist in: (1) restrictive covenants (such as veto rights over some investment decisions, special rights to information, special nomination rights, etc), (2) step-by-step financing and (3) special shareholdings (such as fixed revenues).

Joint ventures are a distinct organisational form designating every form of integration between companies whose scope is the development in common of a business. It is characterised by the setting up of a common company between the parties (the joint subsidiary) for a common enterprise. It consists in a stable cooperation between companies by means of the setting up of new entity subject to the control of the participating companies. It ensures a high degree of stability, its flexibility consists in the choice of the most appropriate business form and the reduction of agency costs consists in the internal mechanisms that characterise that business form. All joint ventures have at their basis the celebration of a joint venture agreement between the participating companies.

Hybrid networks are networks of companies that combine characteristics of each one of the former organisational networks. The legal thinking has tended to characterise two distinct types of networks as hybrid networks due to the fact that their position stands in between bureaucratic and proprietary networks: these are the shareholders' agreements and the cross-shareholdings. Shareholders' agreements consist in agreements celebrated between the shareholders of a company or between the shareholders and third parties that stand side-by-side with a company. Their scope is normally the stabilisation of corporate assets, the consolidation of the position of the partners of a company or other governance issues and is gifted with a certain degree of formalisation. They set up networks destined to govern the interdependence between the companies that are part of the network; however, since they are instrumental to the company, they build up an isolated scheme: they are bureaucratic networks that are inherent to a proprietary network. These agreements are generally licit; however, they are subject to a number of

limitations. In Italy, although there is no discipline for the shareholders' agreements (*patti parasociali*) in private companies (*società di responsabilità limitata*), public companies admitted to trade in stock markets have a number of limitations: firstly, they are subject to an obligation of transparency; secondly, they are limited to a period of five years with the possibility of a unilateral breach. This regime is lighter in the context of companies that are involved in networks of companies as long as they are limited to the participants.⁴³⁴ Portugal also has similar regulations as regards shareholders' agreements. Although they are generally licit and may be celebrated for a variety of scopes (see art.17 of the Portuguese Company Code) they are subject to a number of limitations: firstly, if they are celebrated in public companies admitted to trade in a stock market, they must be made public in accordance with some obligations of transparency; secondly, in the event that the shareholders have special nomination rights of managers and the managers are made liable for the damages caused to the company, the shareholders with whom it has shareholders' agreements will respond solidarity with the manager (art.83° of the Portuguese Company Statute).

Cross-shareholdings amount to a distinct hybrid network. They consist in proprietary networks that are instrumental to a contractual network, typically a contract of collaboration. Cross-shareholdings may constitute a means of collaboration because they create a more stable alliance between the companies that are part of the network. Although they favour cooperation they are seen as dangerous by the legal thinking on account of three reasons: firstly, there is the danger of mixing waters. Since the shareholding in the other company represents a participation in its legal capital, this has the effect that (1) the losses incurred in one company will have repercussions over the other and (2) the company will indirectly acquire its own shares. Secondly, crossing votes will reduce the autonomy of each company, since each one will vote on the general meeting of the other. However, they are usually permitted with precautions because (a) they reduce the scope for opportunistic behaviour and (b) they favour the coordination of strategies.

⁴³⁴ Zorzi, A. (2004). Reti di imprese e modelli societari di coordinamento. Reti di imprese tra regolazione e norme sociali. F. Cafaggi, Il Mulino.

(3) comparative perspectives – contractual networks and organisational networks correspond to two distinct forms of organisation of the activities of companies that are suited to provide an answer to distinct interests. One is tempted to say that there is a game between flexibility and stability on the one hand and transaction and relation on the other. Contractual networks are characterised by a high degree of flexibility but lack lock-in devices and other internal governance mechanisms that prevent the opportunistic behaviours that jeopardise long-term relations; if we add the often overwhelming contractual imbalance between the parties to this game, then it becomes easy to observe that they are not ideally suited to long term relations; organisational networks enjoy a less wide degree of flexibility (it depends on the concrete organisational form that companies choose) and are ideally suited for long-term relations because the structure that the parties choose to govern their relation has several internal governance devices to prevent opportunism imbedded within it; however, they lack the flexibility recognised to contractual models. The reality shows that each network combine one or more of these types of coordination, all depending on the concrete objectives pursued by the parties; it is quite possible that within a contractual consortium the parties decide to set up a joint venture for a specific investment. It all depends on the specific parties and their intentions.

(b) small and medium sized companies – a final word must be given to the reorganisation of small and medium sized companies (SMC). The importance of the SMC contrasts sharply with the lack of attention of the legal and financial literature, which is more often concerned with the financing of the large public company. This is appalling not only because the great majority of companies are effectively SMC (circa 80% in all industrialised countries) but also because the great majority of the population works in SMC. Therefore, a brief note must be given to the reorganisation of SMC.

In order to understand the reorganisation of SMC, a word must be given to its economic structure. SMC are characterised by three distinct features: firstly, there is a small number of participants in the company; they are normally family run businesses or businesses in which there are strong personal relationships between the parties that condition their behaviour. Secondly, the dominating shareholder of SMC is most often also the manager of the

company, having effective control over it the company; this conjugation of the control of the general meeting and of the effective management of the company raises several agency problems in relation to minority shareholders and stakeholders. Thirdly, the labour relations in these SMC are normally characterised by an informal working environment and a high-degree of dialogue between the management and the rank and file. This is normally achieved by informal means, such as a daily walk and conversation with the employees and strong fiduciary relations.⁴³⁵ The economic structure of SMC differs sharply from the one encountered in large companies; therefore, the solutions that have been presented to the reorganisation of companies must be readapted to the specificities of the SMC.

The main question concerning the networks of SMC consists in the interaction between governance, growth and financial structure.⁴³⁶ The former paragraph mentioned that the governance structure of SMC is underpinned in the pre-existing personal relationships established between the shareholders of these SMC and between the shareholders and managers. These personal relationships will have very strong implications in the ways that companies are managed and the means that companies will use in order to establish the cooperation between undertakings. The very strong personal ties established between the constituents of the companies ensure a very effective deterrence mechanism to prevent opportunistic behaviour because the consequences that might arise from this non-cooperative behaviour are potentially very harmful for the network of relationships and the social position that the defective member has; this means that these personal relationships are able to underpin forms of coordination of the activities of companies that do not necessarily presuppose formal mechanisms of control such as the ones to be found in group relations. Interlocking directorates and the acquisition of non-controlling shares are usually very effective organisational means to ensure the collaboration between companies because they ensure the existence of monitoring mechanisms to prevent desertion and the social sanctions arising from the personal

⁴³⁵ Easterbrook, F. and D. R. Fischel (1986). "Close corporations and agency costs." Stanford Law Review **38**(2): 271-301.

⁴³⁶ Cafaggi, F. and P. Iamiceli (2007). Le reti di piccole e medie imprese tra proprietà familiare e nuovi scenari finanziari. Reti di impresa tra crescita e innovazione organizzativa. F. Cafaggi and P. Iamiceli, Il Mulino.

relationships will serve as the necessary deterrence mechanisms. Also, unlike what many people believe, the presence of families in shareholding structures is not impeditive of the presence of outside managers in those same companies or the acquisition of non-controlling shares by banks and other providers of finance. The intention that usually the founders of the companies have of maintaining the ownership of the company in the hands of future generations is not impeditive that the owners of the company take special precautions that the company is run by the most effective persons; this leads to an atypical structure of control in SMC characterised by the separation of ownership and control that gives rise to the agency problems that the literature on corporate governance has pointed out to the large public corporation.⁴³⁷ These agency problems are normally solved by the free appointment and replacement of managers (which depends only of a decision by the general meeting). The acquisition of non-controlling shares by banks and other providers of finance is also not an uncommon phenomenon, although it is circumscribed. The usual operation consists in the provision of a loan to the company that will function as an entry to the shareholding structure of the company; the other owners of the company simply will have to buy-back progressively the share of the bank as the business is run. The shareholding ensures sufficient monitoring mechanisms of the allocation of the capital provided. These phenomena, although not altogether rare, are nevertheless not so widespread as they ought to be.

As regards the growth strategy of SMC, one must begin by questioning the reasons why a company will choose to grow as member of a network rather than by setting up a group. SMC are growingly preferring to use networks as a strategy of growth as opposed to groups on account of a number of factors: the overwhelming presence of interpersonal relations between the members of the network exemplified in the former paragraph reduces the agency and monitoring costs that account for the greatest advantage of the group in relation to the other forms of collaboration between companies; there is also empirical data revealing that the participation in networks is preferred when the companies intend (1) to valorise the complementarities of the resources in the performance of new projects, (2) to face the competition from new markets and

⁴³⁷ Berle, A. and G. Means (1932). The modern corporation and private property. New York, Harcourt Brace.

(3) to try out new materials and productive procedures. The group strategy is preferred by SMC when the growth of companies is destined to consolidate family or personal assets; the network strategy is preferred when experiencing innovative features that frequently involve the presence of external collaborators. This preference of the network strategy is also heavily connected to the forms of financing of these companies and the strategies that they undertake in their relationship with banks and other financial agents.⁴³⁸

Finance is the Achilles' heel of SMC. Banks and other financial entities have a very important role in the growth strategies of SMC because the low possibilities that these small companies have to have access to funds makes them heavily dependent of banks and other financial agents to get the leverage they need in order to foster their growth. However, the relationship of banks with SMC has undergone a period of transformation on account of the coalition of these companies in networks that will have an impact on the type of relations that the financial agents are likely to establish with the networked SMC. In general terms, the economists used to present three types of critics to the financial position of SMC: firstly, they were chronically undercapitalised, making them heavily dependent on leverage; they needed credit to finance each one of their operations and they were essentially run in the latter period to pay for those debts; secondly, the banks used to present critics to the low degree of transparency of companies and the common mixture between the personal and corporate assets. Since banks did not have any reliable data on the true financial position of those companies and the effective guarantees that those companies could present for their credits – rather than the legal capital, which may be an illusory figure⁴³⁹ - they were fearful of providing long-term credits or credits of high-figures. This presented obstacles to companies that intended to undertake long-term costly projects and served as a barrier to business start-ups in high-risk sectors. Finally, there is the perception that the existing

⁴³⁸ Cafaggi, F. and P. Iamiceli (2007). Le reti di piccole e medie imprese tra proprietà familiare e nuovi scenari finanziari. Reti di impresa tra crescita e innovazione organizzativa. F. Cafaggi and P. Iamiceli, Il Mulino.

⁴³⁹ Trefil, B. (2003). Die Niederlassungsfreiheit für Gesellschaften in der Rechtsprechung des EuGH und ihre Auswirkungen auf nationales Recht Law Working Papers. Florence, European University Institute, Armour, J. (2006). Legal capital: an outdated concept. Cambridge, Centre for Business Research, Mota Pinto, A. (2007). The Europeanisation of legal capital: searching for new ways of protecting creditors in limited liability companies. Law. Florence, European University Institute. **PhD**.

guarantees to credits are not sufficient for the new needs of financing. They may be personal, real or commercial: the first favour an unhealthy mixture between personal and company assets; the second do not bind the success of the enterprise to the payment of the debts; the third gives rise to abuses of small undercapitalised companies desperately in need of credit. This places obstacles to the margin of manoeuvre that companies have in pursuing growth strategies and led to the development of new financial instruments.⁴⁴⁰

These difficulties led to the development of new strategies that were specifically designed for the networked company. These strategies might be classified in two large groups, financial strategies and non-financial strategies.

Financial strategies refer to a plethora of processes destined to facilitate the access of SMC to credit. These financial strategies may consist in common funds, new forms of guarantees and the participation of banks in the capital of networks.

Common funds consist in organisational networks set up in the form of commercial companies or cooperatives whose social object consists in the provision of assistance to the access to credit of the SMC that set up the network. This provision of assistance might consist either in the provision of financial guarantees or in the provision of counselling services that are designed to ensure that the SMC meet the requirements of banks to have access to their funds. They are particularly important in the drawing up of business plans and investment projects, as we will see further. The capital of these common funds is composed by the contributions of SMC and they work in close cooperation with banks in order to know the requirements and interests of the banks. One may say that they function as intermediaries between banks and customers. Some of these funds effectively work as intermediaries between companies and banks by requiring themselves the access to the credit. The companies that wish to have access to credit will have to subscribe a number of shares of the fund and will have access to credit in proportion to its

⁴⁴⁰ This is even more negative if we consider that, according to the *social institution* theory of the firm, one of the advantages inherent in the corporate firm – *asset partitioning*, which consists in *limited liability* of the *personal assets* to *corporate creditors* and the *allocation* of the *corporate assets* to the *corporate creditors* exclusively – is one of the advantages that the society recognises to the corporate form in order to induce business start-ups, which are seen as beneficial to the society. Destroying this *partition of the assets* is seen as a regression; see Hansmann, H. and R. Kraakman (2000). *The Essential Role of Organizational Law*, Harvard Law School.

participation in the fund. The fund will then work in close collaboration with the bank ensuring that it has sufficient capital to cover the risk and that the businesses that subscribe the shares are trustworthy projects. They are particularly useful in the financing of business start-ups and ventures in high-risk / high-potential sectors. In the event of default, the risk falls upon the fund and it is entitled to claim its credits from the failed business; the bank has no risk. The main recipients of these funds are small companies whose capital structure does not allow them to easy access to credit and lack the necessary counselling and advice in the drawing up of credible business plans and investment projects.

The recent evolution has also witnessed the development of new forms of guarantees that stand halfway between equity and debt. Traditionally the classical forms of guarantees (personal or real) were seen as a pre-condition for the credit: the person that presented enough assets that could cover the sum in the event of default would be given the credit. The recent evolution that followed the Basilea II agreements on the guarantees that banks could demand from SMC modified this relationship from pre-condition of the credit to the integration within the credit. These new types of guarantees are manifold and only three examples will be mentioned – securities, debt covenants and step-by-step financing - to provide the reader with an idea of its functioning. Securities consist in financial instruments whereby a person is entitled to a fixed income in exchange for the provision of capital. They were initially developed for the large public corporations but the recent evolution of company law in Europe has allowed SMC to issue these types of financial instruments.⁴⁴¹ Securities are a very effective financial instrument on account of a number of reasons: although they do not provide the holder with a right to vote, they provide the holder with extensive information rights that allow them to control the management of the company; they are also freely tradable in the market; therefore, if the bank is not satisfied with the company or it needs credit it might recover its credit by selling the security in the market. Debt covenants consist in conventions celebrated between the bank and its debtors that oblige the company to be run in a certain manner and within certain limits. They also

⁴⁴¹ The most remarkable example was the reform of Italian company law as refers to the *società di responsabilità limitata*. See Zanarone, G. (2003). "La nuova società à responsabilità limitata." *Rivista delle società* **48**: 55-111.

specify financial indicators in order to control the running of the business. In the event that the company fails to abide by the covenant the bank may either claim the debt or, more often, renegotiate the agreement. This obliges the company to apply the capital in the best interest of the provider of credit and functions as a monitoring mechanism of the parties. Step-by-step financing consists in the division of the required amount in parcels with the obligation to meet a number of requirements before receiving to the following parcel. These new forms of guarantee have the advantage of maintaining the separation between the personal and corporate assets and ensuring a more effective monitoring mechanism of the application of the money by the parties to the loan.⁴⁴²

The final relevant financial instrument consists in the participation of banks in the capital of networks. This participation might consist in the conversion of the debt in shareholding in the firm. This ensures that the bank has a very effective monitoring mechanism of the behaviour of the remaining shareholders because the rights recognised to shareholders will be the same as those recognised to the creditor – the bank. This also ensures an alignment of the interests between the creditor and the company and reduces the scope for short-termism: since the bank as a participation in the capital of the company it ensures its credit in the form of a future distribution of results to the shareholders.

Non-financial strategies refer to another plethora of processes in which the provider of finance considers it to be relevant to be involved in a network when deciding to provide the credit. This consists in the evaluation of credit worthiness and in the role of commercial credit.

The evaluation of credit worthiness refers to a situation in which the presence of a company within a network is seen as a positive factor when deciding to attribute the credit. Banks are increasingly recognising the relevance of these relations because the participation within a network ensures a stability of cash-flows and the commercial activity of the company and does not leave it so heavily dependent on the humours of the market. The participation of companies in network projects is even more relevant: projects

⁴⁴² Erzegovesi, L. (2004). Soluzioni di rete per la finanzia delle piccole e medie imprese. Reti di imprese tra regolazine e norme sociali. Nuove sfide per diritto ed economia. F. Cafaggi, Il Mulino.

ensure a high degree of activity and collaboration between companies that ensures their activity and the levels of cash-flows. That is the reason why banks are increasingly turning from the financing of subjects and individual start-ups to the financing of projects and network relations. This has several implications for the governance of companies because they are aware that they will need to be involved in networks and in projects in the event that they want to have access to credit in the future.

Commercial credit is also a very important financial instrument. Commercial credit refers to a situation in which a company agrees to sell first and receive at a latter stage. Commercial credit is of a great relevance in network relations because this reinforces the cooperation and the coordination of activities between companies. Each company knows that if it defaults to pay it will have an impact in the remaining productive chain and the consequences of its default will eventually be internalised on account of the “missing step” of the procedure. This also builds up a form of “peer-pressure” that will serve as a deterrence mechanism: if it defaults the payment no other member of the network will grant it credit in the future.

All of these developments had important implications in the governance of the networked SMC and in the behaviour of the providers of finance. As regards the governance of the SMC, as banks increasingly give relevance to the participation of SMC in investment projects and in networks, companies will need to abandon their atomistic attitude and progressively develop collaborative relations with other companies if they wish to have access to finance. This will have a sharp-impact in the way that companies are managed because they will need to moderate their behaviour to avoid having negative externalities over the actions of other companies and will need to coordinate their strategies with those of other companies. Companies will also need to increasingly projectify their development strategies in the form of investment projects. This represents a sharp modification to the long-term strategies of companies, which will have to be rendered more and more towards the short and medium term. As concerns the relationship with the providers of finance, one can perceive that they are evolving towards more collaborative relations. Instead of adversarial and default/execution schemes of finance, providers of finance are increasingly turning towards relational schemes of finance. These relational schemes consist in the provision of counselling services, support of

investment projects, greater involvement of the providers of credit in the management of the company and greater degree of supervision of the conduct of companies. The objective is not so much to ensure the recovery of the credit but to ensure that it is applied in the most proper way as to satisfy the interests of both parties. This implies a considerable modification of the governance strategies of SMC, who will increasingly have to integrate the concerns of stakeholders in their management strategies.

The impact of these developments in the labour relations within the networked structure had also been profound. In general terms, one may say that the same principles that apply to the large firm have been implemented in the SMC: labour is seen as a competitive resource and as a means to bring value into the company; the main concern is not so much with ensuring job stability but with ensuring the know-how of the workforce (that might have an impact over the regulation of non-competition clauses, for instance). The management labour will have to readapt to the growth strategy of the company; labour will increasingly be managed in the sense of performing the projects that the company is involved in and will have to take into account the interests of the stakeholders of the company when claiming for wages and conditions of work. This will imply necessarily a decentralisation of collective bargaining towards the level of the firm also in SMC and the setting up of new types of agreements destined to use labour in the interest of the projects of the firm.⁴⁴³

(d) a sum-up of post-fordism – it is difficult to attempt to draw up a conclusion over post-fordism given its fluid and highly flexible character. There are three main characteristics however that orient the plethora of processes and procedures that are grouped under the umbrella-concept of post-fordism: decentralisation, projectification and the rise of the networked structure.

Decentralisation refers to the new role of labour within the firm. The rank and file is no longer seen merely as the performers of the commands of the management team but are seen as a strategic resource that is expected to

⁴⁴³ Orlandini, G. (2004). Diritto del lavoro e regolazione delle reti. Reti di imprese tra regolazione e norme sociali. Nuove sfide per diritto ed economia. F. Cafaggi, Il Mulino, Perulli, A. (2007). "Diritto del lavoro e decentramento produttivo in una prospettiva comparata: probleme e prospettive." Rivista Italiana di Diritto del Lavoro (I): 29-65, Tamajo, R. d. L. Ibid. "Diritto del lavoro e decentramento produttivo in una prospettiva comparata: scenari e strumenti." 3-29.

bring about a valuable contribution to the company. This implies several modifications to the traditional method of organisation of work that characterised fordist procedures: the workforce is now expected to work under shorter time frames, be participative, participate in projects and use their knowledge and know-how to improve the quality of the product, under other aspects. This obliges companies to reorganise their incentive schemes in order to ensure the alignment of interests of the workers with the company: instead of long-job tenures and progression based on seniority the workforce is given progression based on valid contributions and the skills to be employed in other places once their positive contribution to the company comes to an end.

Projectification refers both to the strategy of the companies as well to the strategy of workforce. As regards the strategy of companies, companies had to reorganise their business-strategy towards shorter time frames and bet on innovation as a means to compete with other companies. This is particularly relevant as regards the relationship of SMC with the providers of finance. One of the consequences of the reorganisation of SMC was to projectify their business strategies in the form of investment projects if they wished to have access funds by the providers of finance. The same thing is valid for the reorganisation of large companies in the form of SBU: these SBU are expected to perform a certain role and have clearly defined objectives in the form of investment projects; if they fail to bring about the expected return from those projects they will simply be shut down or sold to anyone who expects to rip from profit from them. This implied considerable changes to the strategy of companies, which were obliged to work in shorter time frames and present results in order to survive. This also implied several modifications to the strategy of the workforce. Post-fordism brought about the organisation of the workforce working around project-teams and in shorter time-frames; the basic idea was to re-align the application of the workforce with the objectives of the company: the workforce had to bring added value to the company, be imbedded in the same projects and time frames that the strategy of the company was involved in and comply with the constantly flowing strategy of the company.

Finally, post-fordism brought about the rise of the networked company. Networks of companies consist in a fluid mixture of models of coordination of the strategies of companies that stand between the integration in groups of

companies and the pure hand of the market. These networks consist in contractual and organisational models of coordination of the activities of companies that renders each company totally or partially dependent of the activity of the other without putting in question their autonomy. These networks came to modify significantly the relationships that post-fordist companies had with the suppliers and the providers of finance. As regards the relationships with the suppliers, these contractual and organisational models of coordination ensured that each company would specialise in the production of a particular input; the integration of the company within networks ensured that each specific input would have constant demand and that the activities of each company would not be left to the simple play of market forces. Networks could also be used for the coordination of the activities of companies in R&D and the exploration of new markets. These networks had several mechanisms to reduce agency costs and prevent opportunistic behaviours on the part of the participants of the company. As regards the relationship with the suppliers of finance, the impact of the networked company was felt more abruptly in the case of SMC. Since these companies are chronically undercapitalised and lack a number of transparency mechanisms in order to evaluate their financial health, the providers of finance had to devise new mechanisms in order to reach the market of SMC. These mechanisms may be either financial or non-financial; financial mechanisms consist in the use of the network as a means to get to finance by the means of common funds on the part of the network or the use of relational finance – that stands between debt and equity - as a means to get guarantees to the credit; non-financial means consist in the consideration of the pertinence to the network when evaluating credit worthiness and the role of commercial credit within the network itself.

4.3 Conclusion

This short description of the evolution in the patterns of organisation of companies may allow us to conclude that management, capital and labour have had distinct forms of organisation of their relations throughout the times and that this has influenced the predominant patterns of Corporate Governance, Employee Representation and Collective Bargaining.

The times of “*laissez-faire, laissez-passer*” capitalist gave rise to craft production as the predominant form of organisation of work. A multitude of small and medium companies tailored specific markets emerged and the relations between capital, management and labour were close: the manager was usually also the main shareholder of the company and the relationships with labour were close.

The second stage of capitalism - *coordinated capitalism* - gave rise to the emergence of the large vertically integrated unit. This demanded a considerable modification to the predominant patterns of organisation of work: in Continental Europe, managers had to rely on large shareholdings that would tie the interests of the shareholders to the company and allow them to insist on incremental growth strategies; employees had to organise around mass unions in order to undermine cost competition and allow the determination of the professional careers within these companies. An exception must be made to the particular Anglo-Saxon example that achieved the same results by distinct means: the dispersion of shareholdings insulated management from the pressure of some groups of shareholders and allowed them to pursue incremental growth strategies (because no shareholder or syndicate of shareholders could coerce management boards); labour decided to decentralise at the level of the company in order to pursue direct dialogue with management. This did not prevent the emergence of some industries characterised by concentrated shareholdings and industry level bargaining in the UK albeit they were residual in relation to the general British industrial landscape.⁴⁴⁴

The modifications in the macro-economic environment that have been taking place since the 1970s have had a large impact in the organisation of

⁴⁴⁴ Dignam, A. and M. Galanis (2008). "Corporate Governance and the importance of Macroeconomic context." *Oxford Journal of Legal Studies* 28(2): 201-245.

companies. The financialisation of the economy and the hybridisation of the patterns of Corporate Governance have obliged companies to reformulate their work procedures. The main characteristics of this movement - named as post-fordism - consists in decentralisation, projectification and the rise of the networked company. The main features of each one of these characteristics were already outlined in the former paragraph. The most important thing to retain is that companies currently act at a global level, they require employees to be flexible, participative and innovative in their work procedures and they engage in a multitude of contractual relations with outsourcing companies that establish close relations with the "*mother company*". The main purpose of this scheme appears to be to allow the company to adapt easily to economic fluctuations and to the demands of shareholders. This poses great difficulties as regards the organisation of work, which obliged lawmakers and trade unions to rethink the patterns of Employee Representation and Collective Bargaining that had been implemented so far. That will be the object of the following chapter.

Chapter 5

The Evolution of the National Patterns of Employee Representation and Collective Bargaining

5.1. The Evolution of Collective Bargaining

The final part of this thesis will be concerned with the evolution of employee representative structures and the new type of collective agreements. Considering that the firm is viewed as a nexus of contracts and that the specific configuration of each one of the interest groups that interacts with the company affects the configuration of the remaining interest groups, this chapter will be concerned with the impact of the modifications of Corporate Governance and the Organisation of Companies in the structures of Employee Representation and the Collective Agreements reached. This chapter will defend that the evolutions occurred in the patterns of Corporate Governance and in the Organisation of Companies have led to a rearrangement of the structures for employee representation towards a more decentralised and participative bargaining.

5.1.1 Macro-Economic Environment, Corporate Governance and Firm Organisation

The first part of this thesis outlined the influence of the macro-economic environment in corporate governance and firm organisation. It was argued that, in contrast to the legal origin hypothesis laid down in LaPorta's influential paper "*Corporate Ownership around the world*", the reason for the diversity in the patterns of corporate governance had to be sought in the macro-economic environment.⁴⁴⁵ The demand-side economic policies of the time and the efforts for post-war reconstruction demanded the development of fordist production units that could provide societies with the goods they needed. The institutional complementarities between the fordist model of production and the national

⁴⁴⁵ La Porta, R., F. Lopes-de-Silanes, et al. (1999). "Corporate ownership around the world." *The Journal of Finance* 54(2): 471-517.

patterns of corporate governance and firm organisation were outlined above and they will not be repeated here.

The macro-economic environment changed radically though after the collapse of the Bretton Woods system in 1972 and the oil-shock of 1973. The previous regime led to a situation of “*overaccumulation*” in which the magic recipe of profit retention for reinvestment in expansion could no longer be sustained. The economic policies enforced after 1974 were heavily based upon Milton Friedman’s monetarist supply side policies. These monetary policies focused on fighting inflation by three means: (a) restrictive monetary and tax policies, (b) cutting down on the role of the State and (c) deregulation of markets (in particular the financial sector and the labour market). The restrictive monetary and tax policies consisted in upholding the growth of credit behind the growth of inflation so that interest rates would be artificially raised and therefore the wages and prices would decrease. The wages had to be squeezed harder than prices to boost profits and restore profitability in the long run. The main beneficiaries were operators in the financial sector that benefited from the cheap sales of stocks. Tax policies were another area of government intervention: the system passed from a progressive towards a regressive system and corporate taxes were eased to foster investment. Consumption taxes also increased. The cutting down of the role of the State was achieved by means of the privatisation of several areas of public policy. This opened way for the entry of new investors in certain sectors of the economy. Finally the markets were heavily deregulated: the most important markets that were the object of deregulation were the financial markets and the labour markets. As regards financial markets, the economy was increasingly “financialised”: financialisation refers to a process whereby financial markets, financial institutions and financial elites gain greater influence over economic policy and outcomes. There are several manifestations of this phenomenon: the access to credit was relaxed, stock markets were heavily encouraged in order to foster investment and the creation of wealth in the economy; international capital flows were liberalised. Monetary policies would control the inflation. Labour markets were equally heavily deregulated with attacks to the power of trade

unions, facilitation of the dismissal procedures and the introduction of fixed term contracts and other forms of job precarity.⁴⁴⁶

The impact of this modification of the macro-economic environment in the governance of companies was equally demonstrated before. Ownership structures modified to a great extension becoming more dispersed in Continental Europe and more concentrated in the hands of a few institutional shareholders in the UK; in addition, institutional shareholders also entered the Continental European capital markets modifying to a certain extension the predominant styles of governance. This led to a reinforcement of the rights of shareholders in general and minority shareholders in particular in order to encourage the investment in capital markets. Management boards had to adapt to this new structure in order to become more responsive to the interests of shareholders: the roles of CEO and chairman were separated, independent directors were introduced, auditing was reinforced, several control procedures were enacted in order to control more actively the activity of the management boards and there was an enunciation of the fiduciary duties of shareholders in accordance with the “enlightened shareholder value” view of corporate governance. The overall objective of these reforms in the governance of companies was to make management boards more responsive to the interests of shareholders and therefore curtail the managerial autonomy that gave rise to the agency problems outlined by Berle and Means. If we link the modifications in corporate governance to the modifications in the ownership structures of companies and the macro-economic environment it becomes easy to observe that the management of companies had to become more responsive to the interests of financial shareholders and to the economic fluctuations caused by the monetarist economic policies.⁴⁴⁷

The organisation of companies had to adapt correspondingly to this new institutional endowment. The first and second chapters of this thesis enunciated the contractarian conception of the company and the links between this

⁴⁴⁶ Armstrong, P., A. Glyn, et al. (1991). Capitalism since 1945, Blackwell, Power, D., G. Epstein, et al. (2003). Trends in the rentier income-share in OECD countries, 1960-2000, Department of Economics, University of Massachusetts, Eichengreen, B. (2007). The European Economy since 1945 - coordinated capitalism and beyond Princeton University Press.

⁴⁴⁷ See the second part of this thesis to analyse the developments in the governance of companies and the link the the macro-economic environment.

conception of the company, Employee Representation, Collective Bargaining and Firm Organisation. The former paragraphs mentioned that the fordist model of production was a means of reducing the information and agency costs between managers and employees in the organisation of production demanded at the time. This new institutional endowment (in which management boards had to become more responsive to the financial interests of shareholders and had to manage their firms in fluctuating economic environments) demanded a new type of work organisation. The answer lay in a system of organisation of work that became known as post-fordism or lean production: this system of organisation of work presented a sharp contrast to the fordist model of production because it was underpinned in two main ideas: (a) decentralisation (operational and strategic) of decision-making structures and (b) projectification of labour.⁴⁴⁸

The main challenges that the progressive financialisation of the economy and its impact on the governance and the organisation of companies posed to labour law may be summoned in the following points:

(a) **Labour Law needs to be able to accommodate the new agency costs** - financialisation was described above as a movement initiated in the 1980s in which the financial actors and instruments gained an increased influence in the governance of companies and the overall economic environment. The impact of financialisation was analysed above: the pressure of financial actors (in the ownership structures of companies and in the financial circuits) placed a great degree of pressure upon the managers of companies that had to modify their managerial strategies to meet the challenges placed by these actors. The impact of this new institutional endowment upon existing companies was exemplarily demonstrated by Charley Hannoun:

⁴⁴⁸ Hunold, W. (1993). Lean Production: rechtsfragen bei der Einführung neuer arbeitsformen und techniken, C.H. Beck, Herkommer, S. (1996). Lean production: between myth and reality. Changing Europe: some aspects of identity, conflict and social justice. A. Erskine, M. Elchardus, S. Herkommer and J. Ryan, Avebury, Funder, M. (1999). Paradoxien der Reorganisation - eine empirische Studie strategischer Dezentralisierung von Konzernunternehmungen und ihrer Auswirkungen auf Mitbestimmung und Industrielle Beziehungen, Rainer Hampp Verlag, Powell, W. W. (2001). The Capitalist Firm in the Twenty-First Century: emerging patterns in western enterprise. The Twenty-First Century Firm: Changing Economic Organisation in International Perspective. P. DiMaggio, Princeton University Press, Janning, F., Ed. (2002). Abschied von der Hierarchie - dezentralisierung in mittelständischen Unternehmen München und Meering, Rainer Hampp Verlag, Ekstedt, E. (2007). A New Division of Labour: the "projectification" of working and industrial life.

*“La financiarisation (...) réalise un changement de l’objectif de l’investissement dont la rentabilité sera recherchée moins en fonction des dividendes générés par l’activité qu’à travers la valorisation de la société en vue de sa cession. C’est la plus-value espérée après une gestion plus serrée de l’entreprise qui sera l’élément essentiel de la rentabilité de l’investissement. Il en découle de nouveaux comportements. L’activité sera orientée vers tout ce qui favorise une meilleure valorisation de l’entreprise à court terme. Diminution des coûts, rationalisation de l’organisation, resserrement des niveaux hiérarchiques, informatisation, redécoupage des activités afin de rendre plus transparentes les sources de la création de valeur, bref, l’entreprise est entièrement repensée en vue de la cession de la société, et non pour améliorer de manière pérenne en tant que outil de production”.*⁴⁴⁹

Charles Hannoun attempted to outline the fact that, during the time of fordism, the objective of managers was to grow through expansion by means of the extraction of the profits from the investments in fixed capital. This demanded an organisation or work that could underpin this strategy of growth based upon sector level bargaining and rigid division of tasks. Financialisation brought with it a new managerial strategy in which managers had to concentrate on the financial valorisation of the company: this had the result of a transfer of risk from shareholders towards the employees because the success of the company was no longer measures by means of the conquer of market share but by means of the guarantee of profit levels. Redundancies are usually accompanied with highs in share prices. This new managerial logic also demanded a transformation of the organisation of companies and work in order to accommodate the demands of this new managerial strategy.

This new institutional endowment is capable of creating substantial new agency costs: managers wish to preserve their places in face of shareholder pressure; shareholder are increasingly impatient vis-à-vis managers and increasingly willing to exercise their control rights; employee increasingly share a greater part of the risk of the business without making any capital investments in it because the preservation of the place of the managers and the figures of the “*financial theatre*” is often made at the cost of their wages. One of the tasks required of labour law is to be able to accomodate these new managerial demands underpinned on the need to provide value to the financial

⁴⁴⁹ Hannoun, C. (2008). L’impact de la financiarisation de l’économie sur le droit du travail. Le droit du travail à l’épreuve de la mondialisation. A. Lyon-Caen and Q. Urban, Dalloz: 35-51.

actors. This demands the creation of new instruments to ensure the alignment of interests of managers and employees *vis-à-vis* shareholders (insider/outsider conflict). and new instruments to ensure an effective representation of employees in the new forms of organisation of companies.⁴⁵⁰

(b) need to accomodate new organisational strategies at the national and international level - Labour law equally needs to accommodate the new forms of organisation of companies. The impact of financialisation on the transition from fordism to post-fordism was outlined above and the new forms of organisation of companies - based upon the internal and external decentralisation in strategic business units and in (international) networks of companies - placed great demands to the traditional forms of employee representation. The first part of this thesis attempted to outline the institutional complementarities between the national patterns of employee representation, the predominant national corporate governance pattern and the macro-economic environment. The modifications in the macro-economic environment, the national corporate governance structures and forms of organisation of companies have to be accompanied by an adaptation of the national patterns of employee representation in order to attempt to ensure the continuation of the institutional complementarities between the elements of the productive system. The reorganisation of companies at the national and international level has to be accompanied with a transformation of the patterns of employee representation.⁴⁵¹

⁴⁵⁰ Perulli, A. (2008). *Marché sans droit. Le droit du travail à l'épreuve de la globalisation*. A. Lyon-Caen and Q. Urban, Dalloz: 53-59.

⁴⁵¹ These issues were exemplary analysed by Marie-Ange Moreau when attempting to contextualise the emergence of the European Works Council and the Societas Europaea Directive on the internationalisation of companies in the internal market (to be analysed in further detail). See Moreau, M.-A. (2001). "L'implication des travailleurs dans la société européenne." *Droit Social*: 967-976, Moreau, M.-A. (2006). *Normes sociales, droit du travail et mondialisation*, Dalloz, Moreau, M.-A. (2006). "Restructurations et Comité d'Entreprise Européen." *Droit Social*(March), Moreau, M.-A. (2007). The originality of transnational social norms as a response to globalisation. *Regulating Labour in the Wake of Globalisation. New challenges, new institutions*. B. Bercusson and C. Estlund, Columbia.

(c) **need to integrate and correct financial pressures** - the financialisation of the economy does not simply generate new agency costs between the manager and the employees: it may undeniably weaken the position of the workforce to an unprecedented level. The regulation of labour markets and the asymmetries of power between the employer and the employees were formally dealt with at the national level: the labour and product markets were national and there was the possibility of regulating these markets effectively at the national level. The internationalisation of production and capital markets brought with them a disturbance of this stable balance: the production chains exacerbated by the decentralisation of production became increasingly international in order to take advantage of the comparative advantages (often in terms of labour costs) of national export-oriented markets; the financial movements that influenced to a great extent the internal and external governance of companies became also international with international capital flows in the form of foreign direct investment, bank borrowing and entry of institutional investors in capital markets. The only element of the system that remained national was the labour market: employees are not as mobile as capital and companies and the traditional systems of employee representation became inadequate to meet the new challenges. Let us imagine a company listed in the UK with a productive unit in Portugal: an american hedge fund enters the capital of the company and demands high quarterly results; the company is forced to dismiss part of its workforce in order to cut costs and decides to make several employees in its Portuguese production unit redundant.

This is a situation that leaves employees heavily unprotected because the State and/or the trade unions are incapable of acting as a counterbalancing element in order to bring some social justice.⁴⁵²

Labour law needs to integrate and correct these new realities. Labour law needs to take into account the internationalisation and financialisation of companies and needs to readapt its representative structures in order to accomodate these new forms of production. Labour law also needs to acknowledge that the pressure of financial actors upon the management

⁴⁵² For the question of the weakness of the workforce in face of this overall trend towards the reinforcement of the position of shareholders, see Edwards, T. (2004). "Corporate Governance, industrial relations and trends in company-level restructuring in Europe: convergence towards the Anglo-American model?" *Industrial Relations Journal* **35**(6): 518-535.

boards is currently a reality and needs to readapt its bargaining strategies in order to accommodate the demands of the financial actors because its traditionally weak position *vis-à-vis* the management boards (who have the direction power in the company and are able to terminate employment relationships) may become considerably weaker if it fails to recognise the unstable position of managers. There is a need to evolve from a distributive towards an integrative bargaining in order to collaborate in the pursuit of shareholder value. The integration of these new realities in its bargaining strategies - which are also suffering a considerable transformation in terms of actors and agreements - may be the only means to be able to correct these problems by means of employee representation. As Marie-Ange Moreau puts it:

*"....when management power is exercised at a global level, so that a single corporate decision can result in a multiplicity of territorial/national consequences, the situation calls for the development of a countervailing reactive power equivalent in its scope and nature."*⁴⁵³

The following lines will attempt to analyse how and to which extent the European and national regulations have been attempting to provide an answer to these challenges and how they have been able to integrate in their national systems of employee representation each one of the three points referred above: accommodation, integration and correction of new agency costs and organisational strategies of companies at the national and international level.

5.2 The Evolution of National Employee Representation

The final part of this thesis will attempt to analyse in a comparative perspective the evolution in the national models of employee representation. It will be argued in the following paragraphs that there seems to be a trend in all the European countries under analysis towards the development of a decentralised culture of employee representation and a new philosophy of collective agreements that seem to be evolving towards a more partnerial attitude to

⁴⁵³ Moreau, M.-A. (2007). The originality of transnational social norms as a response to globalisation. Regulating Labour in the Wake of Globalisation. New challenges, new institutions. B. Bercusson and C. Estlund, Columbia. See also Perulli, A. (2007). "Diritto del lavoro e decentramento produttivo in una prospettiva comparata: probleme e prospettive." Rivista Italiana di Diritto del Lavoro(I): 29-65.

bargaining in order to align the interests of managers and employees vis-à-vis shareholders (a so called insider-outsider conflict); but on the other hand employees may also be interested in these developments because they may syndicate with the shareholders in order to increase their monitoring of the management board (the so called accountability conflicts). The following paragraphs will analyse each one of these developments in detail.⁴⁵⁴

5.2.1. The original strategy of European Law

The analysis of the evolution in the national systems of employee representation must begin with a description of the solutions offered by European Law. EU Law deserves to be studied as an independent paragraph in this chapter because it has been extremely active since the 1970s in the subject of employee representation - particularly but not limited to restructuring procedures - and the solutions offered by EU Law have created a delicate balance with the systems of employee representation in the member states. Although the primary concern of EU Law appears to have been to offset the consequences that the internationalisation of companies as a consequence of the completion of the internal market could have for employees, its development over the years appears to have created a “*EU-model of employee representation*” that might have had more far-reaching consequences in the member states.

The EU has been extremely active over the years in the subject of employee participation up to the point that many consider it to be an integrating part of the EU Social Model.⁴⁵⁵ This expression – EU Social Model – deserves a further explanation: it must be understood as an object gifted with a certain

⁴⁵⁴ For an overview of these conflicts and possible coalitions between each one of the interest groups in the company see Kirr, B. Corporate Governance und Arbeitsbeziehungen in Deutschland, Großbritannien und Polen, Gospel, H. and A. Pendleton, Eds. (2005). Corporate Governance and Labour Management - an international comparison, Oxford, Höpner, M. (2005). Corporate Governance in transition: ten empirical findings on shareholder value and industrial relations in Germany, Max Planck Institute für Gesellschaftsforschung.

⁴⁵⁵ Fuchs, M. (2004). "The bottom line of European Labour Law." International Journal of Comparative Labour Law and Industrial Relations 20(2 and 3): 155-176 and 423-444, Laulom, S. (2005). Le cadre communautaire de la représentation des travailleurs dans l'entreprise. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne. Marhold, F. and M. Fuchs (2001). Europäisches Arbeitsrecht. Wien, Springer, Seitz, K. (2004). Europäisches Rahmenrecht für eine Europäische Betriebsverfassung - stand und perspectiven. Tübingen, Köhler-Druck.

content that may be moulded in accordance with national laws and practices. The study of the EU Social Law concerning employee participation struggles with an initial difficulty however: the sources of law providing employees with participation rights are extremely scattered, they were enacted under distinct political circumstances and contain various levels of engagement; therefore it is difficult to present an harmonious study of the employee participation rights contained in the EU legal instruments and to draw up general conclusions that would present the EU Social Model. Despite these difficulties, a considerable array of legal literature has attempted to consolidate the lessons to be drawn from the EU legal instruments concerning employee participation and to substantiate the EU Social Model.⁴⁵⁶ The purpose of this section is to present the conclusions that this literature has reached and to introduce the developments in the national systems of employee representation.

5.2.1.1 A scattered source of law

One of the first difficulties in analysing the EU framework on employee participation consists in identifying and systematising the distinct sources of law. EU Law has been progressively recognising several rights to employee representatives in distinct contexts. The debut took place in 1974, when the Social Action Program declared the progressive engagement of the employees in the life of companies and at the economical and social decisions of the Community as one of the main objectives of the European policies. Its effective implementation initiated in 1974 and 1977 with two extremely influential directives: the Directive on Collective Redundancies and the Directive on the Transfer of Undertakings. These two directives provided for an information and consultation procedure of the employees in situations of collective redundancies and transfer of undertakings. The success in the adoption of these Directives encouraged the proposal and negotiation in 1980 of the Vth Company Law Directive – the Vredeling Directive – that intended to harmonise the structure of public companies in Europe and impose a German style system

⁴⁵⁶ Brors, T. (2004). Das system der Arbeitnehmer-Beteiligungs-Richtlinien - grundlage für eine Europäische Betriebsverfassung? Baden-Baden, Köln, Laulom, S. (2005). Le cadre communautaire de la représentation des travailleurs dans l'entreprise. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne. Moreau, M.-A. (2006). Normes sociales, droit du travail et mondialisation, Dalloz.

of co-determination in multinational companies. The negotiation was unsuccessful and the Directive was never adopted.⁴⁵⁷ The regulatory activity in the EU in the subject of employee participation suffered a halt until 1989 with the adoption of the Community Charter of Fundamental Social Rights of Workers. Although the charter was deprived of a binding effect towards the member states and did not provide individuals with enforceable rights, it is said to have had an extremely influential effect at the political level because it inspired most of the post-1989 Labour Law Directives. The rebirth took place with the institutional modifications brought about by the Maastricht protocol in 1992 that allowed for the adoption in 1994 of the Directive on European Works Councils, which established a mandatory organ for the representation of employees in multinational companies.⁴⁵⁸ The success of this Directive inspired the adoption of the following extremely influential directives: the Directives on Employee Participation of the *Societas Europaea* (Directive 2001/86) and the European Cooperative Society (Directive 2003/72) and the Information and Consultation Directive (Directive 2002/14).

This short description of the legal instruments concerning employee participation allows us to understand that the statutory framework is extremely spanned and fragmented because it uses distinct sources of law (fundamental rights charters - with a variable binding nature - and Directives) enacted in distinct periods in time and political endowments. This obliges us to make a small overview of the legal instruments at stake in order to grasp their concrete content.

⁴⁵⁷ Hutchinson, E. A. S. and R. C. H. Thomas (1982). Company Law in Europe: the Vth Directive and the Harmonisation Programme, Institute of Directors, Vredeling, H. and R. Blainpain (1983). The Vredeling proposal : information and consultation of employees in multinational enterprises, Kluwer.

⁴⁵⁸ The Social Policy Protocol was the legal mechanism designed to resolve the impasse reached over the social policy provisions of the Treaty of Maastricht at the summit of December 1991. Eleven of the 12 member states (the UK opted out) agreed to incorporate the Agreement on Social Policy reached by the Social Partners in October 1991 in the ECT. This Agreement on Social Policy provided the social partners with a constitutional law-making competence within the framework of the EU Institutions and extended the competences of the EU in the field of employment and social relations, allowing for qualified majority voting with respect to some new competences. See Falkner, G. (1996). "The Maastricht protocol on social policy: theory and practice." Journal of European Social Policy 6(1): 1-16.

5.2.1.2. The EU acquis concerning employee participation

The analysis of the European Law on employee participation must necessarily begin with a review of the most important legal texts that provide employees with participation rights. This is where the first difficulty begins: there is a constellation of sources of law that provide employees with participation rights but with various scopes, procedures and extensions. The sources of law may be combined into two large groups however: the fundamental rights group and the secondary law group. This section will review each one of these groups in detail.

(a) the fundamental rights dimension - There are several international legal instruments providing employees with fundamental rights to participation in companies. The most relevant legal instruments consist in the European Social Charter, the Community Charter of Fundamental Social Rights for Workers and the Charter of Fundamental Rights of the EU. The European Social Charter consists in the counterpart of the European Convention of Human Rights in the field of Economic and Social Rights. Although it is legally binding on the states that choose to ratify it, it does not provide individuals with enforceable rights vis-à-vis the State: its enforcement mechanisms consist in the obligation to file a report on the implementation of the Charter that is to be revised by a committee and in a collective action procedure in accordance to which some organisations may file a complaint against a State for failure to implement the charter. The European Social Charter provides employees with rights to information and consultation in arts.21 and 29: These provisions consider that the parties to the agreement are obliged to adopt or encourage measures so as to enable workers and their representatives to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial health of the undertaking employing them and to be consulted in appropriate time on proposed decisions which could affect substantially the interests of the workers, in particular those that could have a large impact over the employment in the undertaking; this principle is further developed in the situations of collective redundancies, providing that the right to information and consultation should be exercised with a view to avoiding redundancies, limiting their occurrence or mitigating their consequences.

The Community Charter of Fundamental Social Rights for Workers was adopted in 1989 and was intended to fill the social gap in Single European Act in 1986. Its importance is hard to estimate because it was purely a soft law instrument: it wasn't binding for the member states and it did not provide employees with enforceable rights; in addition, it had a marginal impact on the case law of the EU.⁴⁵⁹ Some claim that it was very influential however because it inspired many of the post-1989 Labour Law Directives. The Community Charter also contains two provisions concerning the right to information and consultation of the workforce: arts.17 and 18 state that member states should promote the information and consultation of the workforce in accordance with national laws and practices and in particular in some situations.⁴⁶⁰ But the most important part is its preamble where it is stated that

The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European community. The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies. Information, consultation and participation of workers must be developed along appropriate lines, taking account of the practice in force in the various member states. Such information, consultation and participation must be implemented in due time, particularly in connection to restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers.

This statement makes reference to three extremely important aspects of the EU: (a) the completion of the internal market, (b) the protection of workers and (c) the engagement of employees by means of information and consultation procedures. As it will be demonstrated further, the importance of this statement is paramount because it directly inspired the secondary law of the EU.

The Charter of Fundamental Rights of the EU was thought to take one step further by means of the recognition of a catalogue of fundamental rights at the level of the EU. Unlike the Community Charter of Fundamental Social Rights for Workers, it was destined to be enforced: by overcoming the traditional distinction between self-executing rights and rights dependent of positive action, it drew a system of enforceability that in practice obliged the EU

⁴⁵⁹ It was referred only in one case, *UK vs Council (C-84/94)* [1996] ECR I-5755.

⁴⁶⁰ The situations referred were (a) implementation of technological changes, (b) restructuring operations, (c) collective redundancies and (d) labour policies pursued by a company established in another state.

institutions and member states to observe its provisions when implementing EU Law. This means that the provisions of the Charter of Fundamental Rights circumscribe the margin of manoeuvre of the EU institutions and the member states. Its main impact is not to provide individuals with a margin of liberty from the State but to limit the deregulatory impact of EU Law on national policies and to formulate duties to act by the EU institutions. The Charter of Fundamental Rights simply states in its art.27 that workers have a right to be informed in the cases and under the conditions laid down in EC Law and national practices.⁴⁶¹

462

The former paragraph elucidates the extension to which employees enjoy a fundamental right to information and consultation within the sources of law governing the activities of the EU. The concrete legal regime of these international fundamental rights instruments may allow us to put forward two preliminary conclusions: firstly, the recognition of the right was not accompanied with its direct enforceability. This does not mean that they are entirely deprived of a practical effect: with the exception of the Community Charter of Fundamental Social Rights for Workers – with is merely a political statement deprived of any binding nature – the remaining charters overcame the traditional conception of a fundamental right as a right against the State (and, in some situations, private parties); the rights enshrined in these charters impose positive duties to act upon the EU and the member states that apply to its legislative, administrative and judicial activities; this means that not only the law-making bodies (both EU and nationals) have to take positive actions in

⁴⁶¹ Casey, N. (2000). The European Social Charter and the Revised European Social Charter. Fundamental Social Rights. Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights. C. Costello, European Commission, Witte, B. d. (2005). The Trajectory of Fundamental Social Rights in the European Union. Social Rights in Europe. G. De Búrca and B. d. Witte, Oxford. For a general overview of the protection of fundamental rights in the EU see Craig, P. and G. De Búrca (2002). EU Law. Texts, Cases and Materials Oxford. and Chalmers, D., C. Hadjiemmanuil, et al. (2006). European Union Law, Cambridge University Press.

⁴⁶² The absence of direct enforceability of those fundamental rights and their dependence of implementing measures and the legislative/administrative/judicial activity of the EU for their actual implementation was analysed in a short but elucidative article by Frenz, W. and V. Götzkes (2007). "Ein europäisches Grundrecht der Arbeitnehmerin und Arbeitnehmer auf Unterrichtung und Anhörung im Unternehmen?" Recht der Arbeit(4): 216-218. For a systematic overview of the right to information and consultation at the level of fundamental rights see Hassiotis, A. (2000). Die entwicklung des rechts der Arbeitnehmervertretung auf Information und Consultation in der Europäischen union - unter berücksichtigung des deutschen, französischen, britischen und schweizerischen rechts, Schulthess Juristische Medien AG Zürich / Verlag Stämpfli+Cie Bern

order to implement these rights but also that the administrative and the judicial organs have to take into account these rights when applying the national laws. This is expected to provide the rights enshrined in these charters with a maximum expression because their enforcement is a positive duty of the State in all of its activity. These charters were accompanied with control mechanisms to guarantee the enforcement of these rights: the European Social Charter contains a duty to draw up a periodical implementation report to be revised by an independent committee and there are equally procedural mechanisms in accordance to which certain organisations are entitled to initiate a vexatious procedure to pressure the State to implement those rights. The Charter of Fundamental Rights does not contain a similar procedure but it is expected that the action of the ECJ and the European administration will provide these rights with a practical content (and supervise the action of the member states in the observance of these rights when implementing EU Law – art.51). These enforcement mechanisms have important consequences: considering that these rights are not subjective rights but rather duties to act imposed upon EU and national authorities, its main impact will not be one of providing individuals with a margin of freedom from the State but rather limiting the deregulatory effect of European and national authorities.⁴⁶³ The public action of the European and public authorities will always have to respect the content of these rights and recognise them to their fullest extent in their legislative, administrative and judicial activities. This is an extremely important effect whose practicality should not be underestimated: the practical effect is to condition the activity of the public authorities without providing individuals with enforceable rights (and the consequential procedural onus to go to Courts and enforce these rights); the best analogy to understand the functioning of these rights may be drawn from the Law of Obligations: they may be considered as legally protected interests, i.e: as duties to act imposed upon a certain entity but without providing the beneficiaries of these rules with subjective rights to their enforcement (as it occurs, for instance, with health and safety regulations). This means that they are applicable independently of the will of the beneficiaries, which provides the beneficiaries with a much stronger protection

⁴⁶³ Witte, B. d. (2005). *The Trajectory of Fundamental Social Rights in the European Union. Social Rights in Europe*. G. De Búrca and B. d. Witte, Oxford.

as long as there are supervisory mechanisms to ensure their compliance.⁴⁶⁴

This brings us to the second conclusion to be drawn from these international legal instruments: considering that these international legal instruments merely enunciate the existence of a right to information and consultation but refrain from defining its proper content; its practical expression must be sought in the legislative, administrative and judicial acts implementing them. As regards the national level, the powers of the employee representatives as regards participation at the level of the company were already outlined above on occasion of the description of the national regulations. There is a diversity of structures, procedures and levels of employee involvement and that the reasons underpinning those institutional configurations must be sought within a combination of the political economy of the time and the dominant corporate governance pattern in accordance with the theory of institutional complementarities.⁴⁶⁵ The following section will attempt to outline the EU acquis on employee participation contained in the Directives and judicial decisions implementing the fundamental rights contained in the charters mentioned in this paragraph.

(b) Instruments of Secondary EU Law - the EU has been extremely active in the subject of workforce participation since 1974, the year of the enactment of the collective redundancies directive. The EU has, over the years, emanated a number of legal instruments destined to implement the rights contained in the Charters mentioned in the former section that have already led to some decisions of the ECJ. These legal instruments compose the statutory body of the EU acquis on employee participation and they are the effective implementation of the rights contained in the charters. This body of law is not without difficulties however: the rights and regulatory techniques contained in them vary to a great extent and their scope of application is distinct. This section will attempt to describe and contextualise the Directives in order to understand their reach, the solutions contained in them and extract some

⁴⁶⁴ Mestre, B. (2009). The Right to Information and Consultation of the Workforce: context and content of a fundamental right. *The Fundamentalisation of Social Rights*. M.-A. Moreau and B. d. Witte. Florence, European University Institute.

⁴⁶⁵ Aoki, M. (2001). *Towards a comparative institutional analysis*, Stanford University Press, Ahlring, B. and S. Deakin (2005). Labour regulation, corporate governance and legal origin: a case of institutional complementarity European Corporate Governance Institute.

general conclusions concerning the EU *acquis* on employee participation.

The EU exhibits already a body of statutes and case law that compose the EU Law on Employee Participation. The statutes consist in the following Directives: Directive 98/59, on collective redundancies; Directive 2001/23, on the transfer of undertakings; Directive 94/95, on the European Works Council; Directive 2001/86, on employee participation in the Societas Europaeae; Directive 2003/72, on the participation of employees in the European Cooperative Society and Directive 2002/14, establishing a general framework for the information and consultation of employees.⁴⁶⁶ It is useful to make a short description of each one of these Directives.

Directives 98/59 and 2001/23 – the “*restructuring Directives*” – are applicable in situations of collective redundancies and transfer of undertakings. As a preliminary point, it is interesting to read the preambles of the Directives and observe their legal basis: although both of the Directives were enacted under the common market provisions (art.94 and 100ECT), meaning that they were primarily intended to eliminate distortions in the functioning of the common market, they equally make reference to the Community Charter of the Fundamental Social Rights of Workers. This is a very strong indication that they were not only thought as a means of eliminating distortions in the common market (avoiding a race to the bottom in working conditions to attract investment), which served as the legal basis for their enactment in 1975 and 1977, but also as an implementation of the guiding lines of the Community Charter of Fundamental Social Rights of Workers (which inspired their revision in 1998 and 2001). The duties contained in the Directives are of an appalling simplicity although they are far-ranging: whenever the employer wishes to undertake one of these decisions, he is obliged to undergo a procedure for the information and consultation of the employees: the collective redundancies Directive states that the employer must initiate an information and consultation procedure with a view to reaching an agreement whenever he is contemplating to undertake a collective redundancy (art.2(1)); the consultation will have the

⁴⁶⁶ A word must be given on the collective redundancies and transfer of undertakings directives. Although the Directives originated in the 1970s (1974 and 1977 respectively) they were subject to several revisions along the years in order to accommodate the rulings of the ECJ and make them more effective in their implementation. The author opted to mention only the latter version of the Directives because the substantive content of any of them is not modified.

objective, in particular, of (a) avoiding redundancies, (b) limiting their impact or (c) mitigating their consequences; art.2(3) then discriminates the information to be provided to employee representatives in order for them to make constructive proposals during the consultation procedure. The situation is slightly distinct in the case of a transfer of an undertaking: the employer merely has to inform employee representatives (or the employee themselves in the absence of representatives for no fault of the employees) the date, reasons and implications of the transfer and measures envisaged in relation to the employees; in the event that the transferor is planning measures in relation to the employees then he must initiate a consultative procedure with a view to reaching an agreement.⁴⁶⁷

Directives 94/95, 2001/86 and 2003/72 – the “*transnational Directives*” – provide for a distinct regulation of employee representation. These Directives are applicable in the following situations: (a) in community-scale undertakings or groups of undertakings ⁴⁶⁸ and (b) in the setting up of a *Societas Europaeae* or European Cooperative Society. In these situations the employer must promote or allow the setting up of a special negotiating body of employee representatives (as defined by national law and/or practice) destined to bargain with the management board an information and consultation procedure within the undertaking. The idea underpinning the Directives consists in setting up a works-council type body in these companies in order to engage employees in the life of companies by means of periodical information and consultation procedures. In contrast to the former Directives, there is no rigidly laid out procedure for the transmission of information between the management board and employee representatives: the priority is given to an ad hoc procedure, directly bargained by the management and the employee representatives taking into account the specificities of the undertaking and the culture of the company. The intention is to provide the parties with the conditions to bargain an optimal agreement to both parties. This purpose is clearly reminiscent of the objectives laid down in the Charter of Fundamental Social Rights of Workers

⁴⁶⁷ Guéry, G. (1999). *Restructuration d'entreprises en Europe : dimension sociale*, Université de Boeck, Marhold, F. and M. Fuchs (2001). *Europäisches Arbeitsrecht*. Wien, Springer, Ciqui, J. L. and Peter Holt (2002). "Collective redundancies in Europe." *Business Law Review*: 2-4, Blanpain, R. (2008). *European Labour Law*, Kluwer.

⁴⁶⁸ Defined as an undertaking with at least 1000 employees within the member states and at least 150 employees in two distinct member states (art.2,(1),a) Directive 94/95)

pasted above of promoting employee involvement in the life of companies; although only the preamble of the European Works Council Directive makes express reference to it (the remaining Directives only make a nebulous reference to the promotion of the social objectives of the community by means of the involvement of employees), the similarities of the regulation and procedures between the three Directives reveal that they were underpinned in the same ideal: to promote dialogue between management and labour and engage employees into the life of companies. The Directives provide for a parachute in order to safeguard the position of employees and create incentives to bargain: this “parachute” consists in the subsidiary requirements laid down in the European Works Council Directive and the subsidiary procedure laid down in the *Societas Europaea* and the *European Cooperative Society*: as regards the European Works Council, the annex to the Directive lays down the minimum content of the information and consultation agreement; as regards the *Societas Europaea* and the *European Cooperative Society*, in the event that no agreement is reached, there is a subsidiary procedure for information and consultation. This subsidiary provisions are destined to ensure that the management does not merely provide lip-service to the employee representatives and thus avoid signing an agreement claiming that it was impossible to reach an agreement; the subsidiary provisions function as a safeguard for the employee representatives and an incentive for the management board to bargain an agreement. This further reinforces the priority of autonomous information and consultation agreements freely bargained by the management and the employee representatives.⁴⁶⁹

It is important to stress that these Directives are applicable at the

⁴⁶⁹ Colaïanni, L. (1996). Title European works councils : a legal and practical guide : information and consultation of employees in multinational companies : what management needs to know before starting negotiations with the workforce, Sweet & Maxwell, Blanquet, F. (2001). "Enfin la société européenne la "SE"." Revue du Droit de L'Union Européenne(1): 115-128, Aguiló Piña, J. F. (2002). "La sociedad anónima europea: constitución, órganos y otros aspectos." Revista de Derecho Mercantil(246): 1795-1892, Costa, C. T. d. and A. d. M. Bilreiro (2003). The European Company Statute, Kluwer, Davies, P. L. (2003). Employee involvement in the European Company. La Société Européenne – organization juridique et fiscale, intérêts, perspectives, Dalloz: 67-79, Henssler, M. (2003). Unternehmerische Mitbestimmung in der Societas Europaea – Neue Denkanstöße für die “Corporate Governance” Diskussion. Festschrift für Peter Ulmer. M. Habersack, De Gruyter Recht. Moreau, M.-A. (2001). "L'implication des travailleurs dans la société européenne." Droit Social: 967-976, Moreau, M.-A. (2006). "Restructurations et Comité d'Entreprise Européen." Droit Social(March).

transnational level. The transnational level poses great difficulties for labour lawyers because labour laws are eminently national and companies are active at the international level. The difficulties of coordination between employees and the competition between distinct countries to attract investments poses great difficulties to the setting up of transnational employee representative structures, which comes at the disadvantage of the workforce. These Directives are extremely important because they set up a new level: the European level. When a company is active at the European level, it is under a duty to set up a employee representative body that will allow it to engage into dialogue with the employees of the company in the several countries in which it is active. This will reinforce social dialogue at the European level and fill the “*social void*” that the integration of the common market and the territorialisation of national labour laws left open.⁴⁷⁰

The last legal instrument to be analysed is Directive 2002/14 – the Framework Directive on Information and Consultation of Employees. This Directive must be analysed separately because - in contrast to the former - it is neither applicable only in situations of restructuring or to transnational situations. The legal basis of this Directive is art.137(2)ECT and its preamble contains a reference to the Charter of Fundamental Social Rights of Workers; therefore, its objective is not the elimination of the distortions in the common market (as it occurred initially with the first groups of Directives) but the improvement of the living and working conditions of workers within the Community. The objective of the Directive and the principles underlying its provisions are clearly laid down in the following ambitious paragraphs of the preamble:

(7) There is a need to strengthen dialogue and promote mutual trust within undertakings in order to improve risk anticipation, make work organisation more flexible and facilitate employee access to training within the undertaking while maintaining security, make employees aware of adaptation needs, increase employees' availability to undertake measures and activities to increase their employability, promote employee involvement in the operation and future of the undertaking and increase its competitiveness.

⁴⁷⁰ Moreau, M.-A. (2001). "L'implication des travailleurs dans la société européenne." Droit Social: 967-976, Moreau, M.-A. (2006). Normes sociales, droit du travail et mondialisation, Dalloz, Moreau, M.-A. (2006). "Restructurations et Comité d'Entreprise Européen." Droit Social (March), Moreau, M.-A. (2007). The originality of transnational social norms as a response to globalisation. Regulating Labour in the Wake of Globalisation. New challenges, new institutions. B. Bercusson and C. Estlund, Columbia.

(8) There is a need, in particular, to promote and enhance information and consultation and on the situation and likely development of employment within the undertaking and, where the employer suggests that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, in particular in terms of employee training and skill development, with a view of offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected.

(9) Timely information and consultation is a prerequisite for the success of the restructuring and adaptation of undertakings to the new conditions created by the globalization of the economy, particularly through the development of new forms of organization of work.

The principles laid out boldly in the former paragraphs allows us to understand that the information and consultation directive comes more in line of the former directives (destined to implement permanent information and consultation procedures in multinational companies) than in the first group of Directives (destined to provide an answer to a restructuring situation). Its objective is to promote a stable dialogue between managers and employee representatives in order to engage employees in the life of businesses. Despite this sequence, it did not provide priority to *ad hoc* procedures but it preferred to lay down a rigid information and consultation procedure. Arts.3 and 4 provide that in undertakings employing at least 50 employees or single establishments employing at least 20 employees the management is obliged to engage in an information and consultation procedure with employee representatives.⁴⁷¹ The duties of the employer are the following: it has (a) to provide information on the recent and probable development of the activities of the undertaking, (b) to provide information and consultation on the situation, structure and probable development of employment within the company and any anticipatory measures envisaged and information and (c) consultation with a view to reaching an agreement in situations likely to lead to substantial changes in work organisation. A simple reading of the provision reveals that there is a graduation of the duties of the employer in accordance with the subject, that go

⁴⁷¹ The ECJ has had the opportunity to rule on the method of calculation of the thresholds for the Directive to apply. In the ruling *CGT vs Ministre de L'Emploi, de la Cohesion Social et du Logement* (C-385/05) the ECJ struck down a French national provision that did not account for workers under the age of 26 (young workers in their first job) in the calculation of the threshold for the Directive to apply. The social policy defense presented by France claiming that the intention was to encourage the hiring of young workers did not proceed and the French legislation had to be amended. See Mestre, B. (2007). "The ruling CGT & others vs Ministre de l'emploi. Commission vs UK revisited." *European Law Reporter*(4).

from a duty to provide information, to provide consultation and to provide consultation with a view to reaching an agreement. In contrast to the former group of Directives, the procedure is rigid although member states are free to allow the social partners to conclude an *ad hoc* information and consultation agreement (similar to the former group) that respects the minimum requirements laid down in art.4 (art.5). If this provision is read at the light of the principles laid down in the preamble, its objective becomes crisp clear: the purpose is to promote the engagement of employees in the management of the company by promoting the alignment of interests between managers and employees.⁴⁷²

As we may see, the EU acquis in terms of secondary legal instruments concerning employee information and consultation is complex because it was designed to a concrete number of situations: whereas the first group intends to provide employees with an effective answer to a crisis situation of restructuring, the second and the third intend to overcome the social gap in transnational companies and engage employees in the life of companies: but there are several important differences between the second and the third group: the second group is applicable only to transnational companies and gives priority to autonomous procedures and the powers of employee representatives are limited to information and consultation; the third group contains a rigid procedure (the autonomous procedures are left to the option of the member states) and there is a graduation of participation rights that range from information, consultation and consultation with a view to reaching an agreement (making this third group closer to the first in which the consultation is made with a view to reaching an agreement).

(c) comparative perspectives - the description laid out in the former paragraphs of the models of participation contained in the diverse Directives allows us to conclude that there are several gradual and structural differences between them. The first evidence is the following: there are two great distinct stages in the Directives: the Directives of the 1970s - the Directives on

⁴⁷² Reichold, H. (2003). "Durchbruch zu einer europäischen Betriebsverfassung - die Rahmenrichtlinie 2002/14/EG zur Unterrichtung und Anhörung der Arbeitnehmer." Neue Zeitschrift für Arbeitsrecht **20**(6): 289-299, Brill-Venkatasamy, T. (2006). "The information and consultation Directive of 11 March 2002 and its transposition into French law." International Journal of Comparative Labour Law and Industrial Relations **22**(2): 259-277.

collective redundancies and transfer of undertakings - so-called restructuring Directives – were concerned with a thematically circumscribed theme: their legal basis was primarily the harmonisation of the common market and they laid out a rigid procedure to be observed in specific circumstances. Since they were designed to provide employees with a weapon to react to specific circumstances capable of having an impact over their employment situation, they will be named as reactive directives. The Directives of the 1990s and 2000s have a widely distinct approach and objective. Their legal basis is no longer the elimination of distortions to the functioning of the common market but rather the off-setting of the social gap in the European transnational companies and the promotion of the social objectives of the community. Instead of being concerned with a single theme they elect a more global, trans-disciplinary and socio-politically integrated approach with the participation of the workforce at the European level. The objective is no longer to provide employees with a weapon to react to situations of crisis but rather to promote the exchange of views and dialogue within the undertaking in order to allow managers to take into consideration the position of the employees in transnational companies and therefore engage employees in the life of the company. They are no longer thematically circumscribed but rather intend to engage employees in issues of their interest and encourage the alignment of interests between employers and employees in the management of companies. This is the reason why they may be named as pro-active directives: they are not limited to a single theme but have a potentially greater scope of application – the promotion of social dialogue at the level of the company and the involvement of employees.⁴⁷³

The distinction between the reactive and the pro-active Directives should be stressed and be the object of a further explanation. Although both of the groups of Directives have the same scope – the promotion of the involvement of employees in the life of companies – the evolution of their internal regulation reveals an evolution in the EU's approach to social issues and the practical content of the EU Social Model as regards worker participation. Whereas the reactive directives had primarily harmonisation as their main goal (in order to

⁴⁷³ Mestre, B. (2009). The Right to Information and Consultation of the Workforce: context and content of a fundamental right. The Fundamentalisation of Social Rights. M.-A. Moreau and B. d. Witte. Florence, European University Institute.

avoid a race to the bottom in terms of labour conditions) and only incorporated the provisions of the Community Charter of Fundamental Social Rights of Workers in their revision, the pro-active directives were enacted in the fulfilment of the objectives of social economy and democracy laid out in the Charter and in the Maastricht protocol. The provisions of the Charter concerning employee participation replicated above reveal precisely the intention of the community: the improvement of the situation of workers in the effort of the completion of the common market by means of information, consultation and participation in particular (but not only) connected to restructuring operations. The opening to employee participation outside restructuring operations opened the roads for the Directives on European Works Councils, Societas Europaea and European Cooperative Society and the Information and Consultation Directive. Social dialogue between employers and employees and the engagement of the social partners in the economic life of the Community became a key element in the European Social Model. This is even more so if we consider that the mechanisms of employee participation go well beyond information and consultation at the level of the company. At the institutional level, the Maastricht Treaty had the merit of institutionalising the participation of employers and employees in community law-making by means of the European Social Dialogue. In accordance with the redaction of arts.136 and ff of the ECT the European Social partners have not only a consultative role in social issues (because the Commission is obliged to consult them) but they equally have a legislative role: they may take the legislative proposal in their own hands or autonomously conclude collective agreements that may be implemented in accordance with their internal mechanisms or be subject to the approval of the Council – which will act as a declaration of general interest.⁴⁷⁴ Therefore the pro-active Directives must be understood in the line of the evolution of the European policies from the perspective that social integration would emanate autonomously from economical integration towards the conceptualisation of a global political and legal concept of a European Social Policy that implicated

⁴⁷⁴ Moreau, M.-A. (2008). Les échanges entre les droits, l'expérience communautaire - une lecture des phénomènes de régionalisation et de mondialisation du droit Collection Droit de L'Union Européenne. S. Robin-Olivier and D. Fasquelle.

social dialogue and employee participation.⁴⁷⁵

The cooperation model laid down in the Directives has certain communalities and differences. As a preliminary word, one must begin by commenting the interesting perspective of Sylvaine Laulom, who claims that the European Model laid out in the Directives is a model more based on rights and actions than actors or subjects.⁴⁷⁶ In accordance with the view of this author, the Directives did not harmonise employee participation structures but simply provided the national pre-existing actors with a common set of rights that would not bring a great degree of modifications to the national structures. The main concern of the Directives would be to provide employees with the possibility of enforcing the provisions contained in them and not to attempt to harmonise structures of employee representation. Although this argument is quite seductive because the Directives effectively did not bring about directly extensive modifications to the structures of employee participation in countries that have a strong tradition of social dialogue – such as Germany and France, despite their several differences – it seems to disregard two important points: firstly, as regards multinational companies, the European Works Council and the Societas Europaeae/European Cooperative Society Directives were in fact quite innovative because they created a new body applicable to multinational companies. Despite the possibility of evading the setting up of a European Works Council created by arts. 6(3) and 13 of Directive 94/95 – which allowed multinational companies to set up or maintain an *ad hoc* information and consultation procedure of the employees directly or their representatives instead of a European Works Council – the remaining Directives did not allow for this exception and employee representative bodies had to be established;⁴⁷⁷ in addition, in multinational companies that chose to evade the setting up of a

⁴⁷⁵ Brors, T. (2004). Das system der Arbeitnehmer-Beteiligungs-Richtlinien - grundlage für eine Europäische Betriebsverfassung? Baden-Baden, Köln, Seitz, K. (2004). Europäisches Rahmenrecht für eine Europäische Betriebsverfassung - stand und perspectiven. Tübingen, Köhler-Druck.

⁴⁷⁶ Laulom, S. (2005). Le cadre communautaire de la représentation des travailleurs dans l'entreprise. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne.

⁴⁷⁷ Marie-Ange Moreau was quite keen in this point stressing that the imposition of the existence of a mandatory organ for the representation of employees in transnational companies and the reflexive regulatory approach to information and consultation procedures amounts to an original solution capable of having far-reaching consequences. See Ibid.

European Works Council by means of arts.6(3) and 13 of Directive 94/95, the employees will still benefit from an information and consultation procedure that either existed before or was set up intentionally to avoid the creation of a European Works Council but may nonetheless be capable of bringing modifications to the internal governance of those companies. Secondly, although the author claims that it is a model more concerned with rights than actors, in reality admits at the end of her paper that these rights seem to be having an indirect effect of modifying the traditional roles of the pre-existing structures of employee representation. That will be the subject of the next section, where it will be defended that the Directives seem to have had an indirect impact on national structures for employee representation by modifying to a considerable extent their role. This section will be concerned with an analysis of the cooperation model embedded in the Directives.

The cooperation model embedded in the employee participation Directives seems to be underpinned in three great elements: actors, procedures and themes. As regards the actors, one must begin by stressing that all the Directives (both reactive and proactive) demand the existence at least of the possibility of employee representation at the level of the company with the consideration of the national model. In the reactive directives and the Directive 2002/14, the setting up of the employee representation body is left to national laws and practices but the employees must have at least the possibility to set up an employee representative body mandatorily recognised by the employer. The effectiveness of these Directives and the need to have a representative body recognised by the employer has been the object of two decisions from the ECJ that stressed the importance of national laws providing for the possibility of setting up an effective employee representation for the effective implementation of the Directive. In *Commission vs UK*⁴⁷⁸ the ECJ struck down the tradition of voluntarism in the British system of collective bargaining in accordance to which only recognised unions could enjoy the prerogative of collective bargaining (being that recognition was a purely voluntary act of the employer). This led to a statutory change – to be analysed in the next section – in accordance to which trade unions could recur to a

⁴⁷⁸ Commission vs UK (C-382/92 and 383/92). Davies, P. L. (1994). "A challenge to the single channel." *Industrial Law Journal* 23: 272 ff.

statutory procedure for recognition to be mandatorily recognised by the employer and enforce the information and consultation procedures laid down in the collective redundancies and transfer of undertakings directives. In the case *CGT & others vs Ministre de L'Emploi*⁴⁷⁹ the ECJ struck down some provisions of the French *contract premier emploi* in accordance to which workers under a certain age would not be accounted for in the thresholds for the calculation of the number of employee for the application of the information and consultation provisions laid down in the collective redundancies and employee information and consultation Directives. These two cases reveal the importance that the ECJ attaches to the effective representation of employees at the level of the undertaking. Although the Directives leave the criteria for employee representation to national laws and practices, the reality is that these national systems have been subject to the scrutiny of the ECJ and that the ECJ has had no problems in striking down certain national provisions that would render the provisions contained in those directives meaningless by rendering void the possibility of setting up employee representative bodies. This is nothing but an effective implementation of the objectives of the promotion of social dialogue between management and labour laid down in the Charters and the Directives described above. This objective seems to have been also clearly pursued in the pro-active directives. These Directives demand the setting up of a special negotiating body that will bargain an ad hoc information and consultation procedure and the practical arrangements for the setting up of an employee representative body. This employee representative body is mandatory in both the *Societas Europaea* and the *European Cooperative Society* Directives; only the *European Works Council Directive* allows for a more flexible procedure: although it claims that it is in principle mandatory but in fact it allows for its evasion in the event that the multinational company already has a procedure for informing and consulting employees or decides to set up another consultative procedure, the intention to promote company-level social dialogue remains and the duties to consult still seem to presuppose some kind of employee representation – to be defined by the employee representatives in a flexible ad hoc procedure.

⁴⁷⁹ *CGT and others vs Ministre de l'Emploi, de la Cohesion Social et du Logement*, (C-385/05). Mestre, B. (2007). "The ruling *CGT & others vs Ministre de l'emploi*. Commission vs UK revisited." *European Law Reporter*(4)., pp.151.156.

The pro-active directives deserve a more elaborate explanation. These Directives were enacted as an attempt to provide an answer to the difficulties created by the internationalisation of companies arising from the completion of the common market and globalisation. These transnational companies operated in a “*social vacuum*” because there were no transnational social norms and, considering the principle of subsidiarity to which the EU is bound to, the member states remained competent in many social issues. The challenge was to devise a means of avoiding that the economical integration would have adverse consequences for national social systems and to fill the social representation gap in transnational companies. The answer lay in a European Social space underpinned in minimum social norms in the framework of social harmonisation.⁴⁸⁰

These transnational social norms consisted in a legal framework recognising a transnational collective autonomy. This solution was designed in accordance with a principle that Marie-Ange Moreau calls the “*principe de concordance*”. This principle claims that the challenges raised by the internationalisation of companies in the framework of the completion of the common market must have an adequate and proportional answer by the transnational social norms. This principle is subdivided in three main sub-principles: concordance of scope, concordance of time and concordance of action. There is a concordance of scope when room of manoeuvre provided for the social norms is an adequate answer to the space of manoeuvre of the employer; if the power of the employer is exercised at the European level as a consequence of the internationalisation of the company in the margin of manoeuvre provided by the common market then the room of manoeuvre of the employee representatives must equally be exercised at the European level; there must be a cross-border representation of employees in order to fill the social gap caused by the national scope of employee representation. There is a concordance of time when the answer provided by the employee representatives is able to act as a counterbalancing power to the actions of the employer: this demands a timely information of the employees and the recognition of time to act. There is finally a concordance of action when the social norms reflect and integrate the transnational dimension of the actors,

⁴⁸⁰ Moreau, M.-A. (2006). Normes sociales, droit du travail et mondialisation, Dalloz.pp. 330-349.

they have a transnational content and they are enforceable at the transnational level.⁴⁸¹

This framework may allow us to extract some conclusions as regards the actors of the Directives. The Directive's constant reference to national laws and practices must be understood *cum grano salis*: although it is true that the Directives do not impose a uniform model of employee representation, it is nonetheless true that the existing national models must be configured in such a way as to allow for employees to set up a representative body that may effectively engage in dialogue with the management. The rulings *Commission vs UK* and *CGT vs Ministre de L'Emploi* mentioned above illustrate the need for the national models to respect the provisions of the directives: in *Commission vs UK*, the ECJ was not afraid to strike down the secular system of voluntarism in the UK; in *CGT vs Ministre de L'Emploi* the ECJ limited member state's competence to determine thresholds for an effective system of representation because the practical effect was to deprive the Directives of their effectiveness (even in the presence of labour market policy justifications). This pressure towards effective systems of company level dialogue is even more evident in the pro-active Directives: the *Societas Europaea* and the *European Cooperative Society Directives* do not allow for any deviation from the system of employee representation laid out in them: there must be a company-level organ for the representation of employees within these companies gifted with information and consultation rights that must obey a minimum threshold. Only the *European Works Council* allows for a deviation from the principle that there must be an employee representative body as long as employees are gifted with information and consultation rights. This set may allow us to conclude that the EU Social Model presupposes some kind of mandatory employee representation that is capable of engaging into dialogue with the employer; although the structure of this representation is left to national laws and practices, the reality is that it must be configured in such a way as to allow for the effective implementation of the provisions contained in the Directives; this means that employee must have at least the possibility to set up an organ representative of their interests mandatorily recognised by the employer both in

⁴⁸¹ Moreau, M.-A. (2007). The originality of transnational social norms as a response to globalisation. Regulating Labour in the Wake of Globalisation. New challenges, new institutions. B. Bercusson and C. Estlund, Columbia.

national and multinational companies.⁴⁸²

These directives represent an original answer of the EU in terms of filling the social vacuum created by the internationalisation of companies and implementing the principle of concordance to the possible extent. The first relevant element consists in the mandatory employee representation. All proactive Directives⁴⁸³ require the setting up of an employee representative body as a special bargaining unit - to bargain the participation agreement - and latter as a transnational works council. This body is to be set up in accordance with pre-determined very specific rules concerning the representation of all the employees of the company. These rules concern a division of the posts in accordance with a criterion of division of the rank and file by country in accordance with pre-determined thresholds of representation. The purpose is to attempt to avoid the pre-dominance of a particular group over the remaining employees. The selection of the representatives is equally to be made in accordance with national rules in order to ensure an adequate integration with national traditions. It is worth noting that this representation of employees is strictly mandatory: the *Societas Europaea* and European Cooperative Society cannot be incorporate without an agreement on employee representation and companies covered by the European Works Council Directive must at least initiate a procedure for the setting up of employee representative structures and, if they wish to avoid in-company representation, they must prove that the pre-existing agreements suffice to satisfy the requirements of representation. Therefore employee representation becomes mandatory in certain transnational European companies and represents an adequate implementation of the principle of concordance: the social vacuum was filled with the requirement to have employee representation.

The second relevant element of implementation of the principle of concordance was made by means of the information and consultation procedures. These procedures present two original elements: firstly, they are ad hoc procedures, meaning that they are set up by the parties themselves in

⁴⁸² Brors, T. (2004). Das system der Arbeitnehmer-Beteiligungs-Richtlinien - grundlage für eine Europäische Betriebsverfassung? Baden-Baden, Köln.

⁴⁸³ With the exception of the art.13 agreements of the Directive on European Works Councils, which allow to avoid setting up a EWC as long as pre-existing agreements satisfy the participation requirements.

accordance with their specific needs of the company and sector. In order to overcome the chronic debility in employee representation, the Directives also provide for fall-back clauses containing subsidiary information and consultation procedures in case the bargaining fails. This is an extremely important element because it attempts to ensure that the representation is not only formal but substantial: the information and consultation rights of employee representatives (ad hoc or deriving from the subsidiary provisions) are thought as a means of implementing the principle of concordance of time and action: employees are timely informed about issues affecting their interest to a relevant extent and may discuss those issues with the management board. It is worth stressing the freedom granted to the parties in setting up their own agreements because this attempts to ensure that the unregulated room of transnational companies is filled with regulation adequate to the interests of the parties.

These two paragraphs intend to demonstrate the originality of the approach followed by the EU in these directives. Considering that the internationalisation of companies raises a number of complex issues that may have adverse consequences to the workforce due to the unregulated space in which they are active, the EU has attempted to design an original solution to these problems. This original solution is designed in accordance with what Marie-Ange Moreau calls the “*principle of concordance*” (of scope, time and action) which consists in the requirement of an effective answer to the internationalisation of companies. This approach consists in the requirement to set up employee representative bodies in these transnational companies that ensure an adequate representation of the employees of all the countries in which the company is active and in the provision of room to set up adequate information and consultation procedures (underpinned in fallback clauses to fight the predominance of the employer). This set of mechanisms is fought to ensure the representation of one key stakeholder - employees - in transnational companies in an unregulated space and fight the adverse consequences of the internationalisation of companies. This amounts to an effective implementation of the principle of concordance because (1) they result from a transnational elaboration, to reflect and integrate the transnational dimension of the different actors, (2) they have a transnational content, so as to reflect the specificity of transnational labour regulations and (3) they are enforceable at the

transnational level in order to ensure an effective mode of control.⁴⁸⁴

The Directives also set out procedures for information and consultation although these procedures equally vary to a great extent. As a preliminary word one must state that the Directives provide employees with three distinct rights: (a) right to be informed, (b) right to be consulted and (c) right to be consulted with a view to reaching an agreement. There is a progression of the rights because each one of them presupposes the former; on the other hand, not all Directives provide for the same level of participation. The right to be informed simply consists in the employer's duty to acquaint employees with certain facts. This duty is differently regulated across the Directives: in general terms, the reactive Directives are extremely precise on the type of information to be transmitted to the employees, laying out a concrete duty to provide the employees with specific facts.⁴⁸⁵ The pro-active Directives also provide employees with extensive information rights although they are defined in a much broader manner: for instance, the *Societas Europaea* Directive defines information as the transmission of elements to employee representatives of "*questions which concern the SE itself or any of its subsidiaries or establishments situated in another member state or which exceed the powers of the decision-making organs in a single member state...*"; although the subsidiary provisions concretise the duties to inform, they are still enunciated in such broad formulae that are capable of covering any element.⁴⁸⁶ The annex to the European Works Council Directive equally states that the right to information covers the duty to fill an annual report on the progress of the undertaking and its future prospects. Finally the information and consultation Directive simply states that information means the transmission of data that will

⁴⁸⁴ See the works of Marie-Ange Moreau: Moreau, M.-A. (2001). "L'implication des travailleurs dans la société européenne." *Droit Social*: 967-976, Moreau, M.-A. (2006). *Normes sociales, droit du travail et mondialisation*, Dalloz, Moreau, M.-A. (2006). "Restructurations et Comité d'Entreprise Européen." *Droit Social*(March), Moreau, M.-A. (2007). The originality of transnational social norms as a response to globalisation. *Regulating Labour in the Wake of Globalisation. New challenges, new institutions*. B. Bercusson and C. Estlund, Columbia, Moreau, M.-A. (2008). Les échanges entre les droits, l'expérience communautaire - une lecture des phénomènes de régionalisation et de mondialisation du droit *Collection Droit de L'Union Européenne*. S. Robin-Olivier and D. Fasquelle.

⁴⁸⁵ See art.2(3) of Directive 98/59 and art.7(1) of Directive 2001/23.

⁴⁸⁶ The annex to Directive 2001/86 claims that the management organ has to file an annual report to the employee representatives on the progress of the business of the undertaking and its future prospects and copies of the agendas of the meetings of the company and any documents submitted to the shareholders.

allow the employee representatives to be acquainted with recent and probable development of the undertaking and its activities.

As we can observe, the extension of the right to information is differently regulated in the Directives. The reasons behind this diversity must be sought in the objectives underlying the Directives and their legal basis: whereas the reactive directives intend to provide and answer to a crisis situation (a collective redundancy or a transfer of an undertaking), the proactive Directives intend to engage employees into the life of companies; therefore the information to be provided in the latter situations must be much more extensive and less regulated because they are intended to encourage a more permanent dialogue. There seems to have been a fear that a very concrete regulation of the duties to inform would encourage employers to limit themselves strictly to those obligations; if they are laid out in a much broader scope, it might encourage dialogue and the exchange of ideas. The intention is to encourage the parties to develop their own arrangements for information and transmit the information that are more appropriate to their purposes.⁴⁸⁷ This is nothing but Teubner's idea of reflexive law in practice.⁴⁸⁸ This is strictly dependent of one particular factor however: *the strength of the employee representatives*. The efficacy of the procedures for information and the development of social dialogue at the level of the company depend of the existence of solid employee representative structures that are capable of engaging in a collaborative relationship with the management. The Directives provide for the possible mechanisms to set up those structures but they do not guarantee their effectiveness. Solid employee representative bodies are a precondition for the development of social dialogue.

This brings us to the second right: consultation. The definition of consultation is much more difficult: the Directive on European Works Councils

⁴⁸⁷ The importance attached by the EU to employee information goes well beyond the Employee Participation Directives. The following examples provide employees with considerable information rights: Directive 91/553, on the employers' duty to inform employees of the conditions applicable to the employment relationship; Directive 2004/25, on takeover bids provides employees with information rights concerning the takeover operation; Directive 2006/54 claims that employers should be encouraged to provide at a regular basis information concerning the measures implemented to promote equal treatment of men and women in the undertaking. The examples are innumerable.

⁴⁸⁸ Teubner, G. (1982). Reflexive Rationalität des Rechts. *Working Papers*. Florence, European University Institute.

firstly defined it as *“an exchange of views and establishment of dialogue between employee representatives and the central management”*. This definition was developed in the Directives on the Societas Europaea and the Information and Consultation of Employees stating that this exchange of views should be made *“at a moment, way and content that will allow the employee representatives to express their views over the measures to be undertaken by the competent authorities that should be taken into consideration in the decision-making framework”* and *“to be reunited with the employer and obtain a reasoned answer to any reasoned opinion that they may issue”*. These elements allow us to conclude that the consultation simply implies a dialogue between the employee representatives and the management at the end of which the employee representatives should issue an opinion. It is of paramount importance to stress that the consultation does not need to be made with a view to reaching an agreement. It is limited to a simple dialogue and exchange of views between management and labour in order for the management board to be acquainted with the opinion of the workforce. The employer is not obliged to follow the opinion of the employee representatives nor to reach an agreement if he does not wish to do so: he simply has to provide a reasoned answer to the opinion of the employee representatives and take it into consideration in its decision-making procedure. It is interesting to observe that the duty to consult employee representatives is differently regulated in throughout the Directives: whereas the reactive directives provide for an information and consultation procedure with a view to reaching an agreement (to be analysed in the below), the proactive directives seldom reference to the need to reach an agreement: the only occasions in which the proactive directives point towards the need to reach an agreement are in the situations that affect the interests of the employees to a considerable extent such as substantial changes to work organisation or plant relocations. These are exceptional circumstances however and the determining element of the consultative procedure consists in the exchange of views between management and labour. The reasons for this difference in treatment have been analysed above and are easy to guess: whereas the reactive directives intend to provide an answer to situations of crisis, the proactive directives intend to establish social dialogue at the level of the company and encourage collaboration between management and labour. That is the reason why there is

not much emphasis on the reaching of an agreement (because that could undermine the need to collaborate on account of employers' resistance to any loss to the managerial prerogative) unless there are exceptional circumstances affecting employee interests to a considerable extent (in which a reaction is advisable). There are two further points to be made as regards the regulation of consultation in the Directives: firstly, one must stress the subject-matters. Whereas the reactive directives (and their emphasis on the guiding of the consultative procedure towards the reaching of an agreement) are thematically circumscribed, the proactive directives have such a wide scope of application (expressed in terminologies such as the "*situation of the undertaking*" and "*probable developments*") that they are capable of covering a wide array of subjects. That is also the reason why the European legislator did not place much stress upon the reaching of an agreement: considering the opening of social dialogue to new subjects, the most important point was to foment social dialogue at the level of the undertaking and then expect that forthcoming agreements and the taking into consideration of employee interests in the decision-making procedures of the company would arise as a natural consequence of the establishment of social dialogue (by means of an exchange of views) in the company. The second relevant point worth mentioning for the consultation procedure concerns its regulation: whereas the reactive directives and the Directive on employee information and consultation imposed a rigid procedure, the proactive directives leave the regulation of the procedure to the autonomy of the social partners (managers and employee representatives); the only exception consists in the subsidiary provisions applicable in the absence of an agreement. The reasons behind this diversity of regulatory techniques are easy to explain: the reactive directives and the information and consultation are applicable at the national level where there is a diversity of structures of employee representation. Member states simply had to modify to a slight extent these national structures in order to accommodate the demands of the Directives. The proactive directives are applicable at the international level where there was no regulatory framework. Considering the diversity of national practices in every country in which those multinational companies were active, it would be a violation of national autonomy to impose one specific model of participation. That is the reason why the European legislator chose to leave to the autonomy of the social partners – by means of a

phenomenon known as reflexive law – the regulation of the concrete procedures as long as they were in accordance with a certain pre-established criteria of quality.⁴⁸⁹

The last level of involvement consists in the consultation with a view to reaching an agreement. This is a further development of the duty to inform and consult that is used with extreme caution by the Employee Participation Directives. Consultation with a view to reaching an agreement consists in a further development of the duty to consult that implies that the consultation should be made with the purpose of the harmonisation of interests. This does not mean of course that there must be a harmonisation of interests in the sense of the *Interessenausgleich* laid out in the §§112 BVG in order for a certain managerial decision to be implemented; although member states are free to do so (because Directives only establish minimum harmonisation) they are not obliged to do so. The Directives simply demand that the parties behave in such a way that reveals that they at least attempted to harmonise their interests in the concrete subject of the consultation.⁴⁹⁰ The duty to consult with a view to reaching an agreement is seldom used in the Directives: it is used in the reactive directives and in the *Societas Europaea* directive and Information and Consultation directive. In the collective redundancies directive, art.2(1) of Directive 98/59 clearly states that the consultation must be made with a view to reaching an agreement. This is perfectly understandable because since the procedure is enacted in situations of termination of the employment relationship then the need to promote a conciliation of interests in this situation of maximum crisis is more acute. It is interesting to observe the type of agreement that the Directive intends to promote: art.2(2) states that the consultation procedure

⁴⁸⁹ Dufour, C. and U. Rehfeldt (1991). "Existe-t-il un modèle européen de représentation des salariés dans l'entreprise." *Travail et Emploi* (14 ff), Colaianni, L. (1996). Title European works councils : a legal and practical guide : information and consultation of employees in multinational companies : what management needs to know before starting negotiations with the workforce, Sweet & Maxwell, Blanke, T. (2002). Workers' right to information and consultation within the undertaking (art.27). European Labour Law and the EU Charter of Fundamental Rights. B. Bercusson, ETUI, Laulom, S. (2005). Le cadre communautaire de la représentation des travailleurs dans l'entreprise. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne.

⁴⁹⁰ Brors, T. (2004). Das system der Arbeitnehmer-Beteiligungs-Richtlinien - grundlage für eine Europäische Betriebsverfassung? Baden-Baden, Köln, Seitz, K. (2004). Europäisches Rahmenrecht für eine Europäische Betriebsverfassung - stand und perspectiven. Tübingen, Köhler-Druck.

should be made with a view to avoiding or mitigating the consequences of the redundancies (thus giving an indication that the redundancy is a solution of last resource that should be moderated). This duty to undertake a consultation with a view to reaching an agreement has been the object of a decision by the ECJ in the case *Junk vs Kühnel*.⁴⁹¹ This case concerned a situation in which an employer had initiated a collective redundancy procedure simply by offering a monetary compensation to the employees. The ECJ struck down this procedure because it claimed that the consultation procedure laid down in the Directive was not simply a formality but a true obligation to negotiate the termination of the employment contracts (§43 of the ruling). This reasoning was further developed in the case *G. Agorastoudinis vs Goodyear* in which the ECJ stated that the employer could not simply terminate the activities of an undertaking without engaging into a collective redundancy procedure (a decision that touches upon the property rights of the employer).⁴⁹² The combined effect of these cases illustrates the fact that the duty to reach an agreement in collective redundancy procedures is to be taken seriously even if it leads to a certain limitation to the managerial prerogative by obliging the employer to bargain. This expression must be understood properly however: the limitation to the managerial prerogative does not mean – of course – that the EU or the ECJ imposed any kind of co-determination in Europe. It simply means that it is not enough to have an information and consultation procedure (in the sense of allowing employees to express their opinion on the redundancy or the compensation offered); the redundancy itself must be subject to a true negotiation with the employees so as to mitigate the consequences of the dismissal. Although the employer's decision is left untouched, he must at least enter into a true negotiation with the employees in order to avoid the redundancies or mitigate their consequences.⁴⁹³ This is a far-reaching duty that is capable of modifying the systems of industrial relations in some countries – such as France, Portugal and the UK – where the managerial prerogative was

⁴⁹¹ *Irmtraud Junk vs Wolfgang Kühnel* (C-188/03).

⁴⁹² *G. Agorastoudinis vs Goodyear Hellas AVEE* (C-187/05 to C-190/05).

⁴⁹³ Dorssemont, F. (2006). "Case C-55/02, Commission of the European Communities v. Portuguese Republic, judgment of the Second Chamber of the Court of Justice of 12 October 2004 ; Case C - 188/03, Imtraud Junk v. Wolfgang Kühnel, judgment of the Second Chamber of the Court of Justice of 27 January 2005." Common Market Law Review 43: 225-241.

unquestionable: although the decision to terminate the employment relationships is still of the competence of the employer, he must at least bargain the decision with the employee representatives. This leaves us with the question of knowing whether this duty to attempt to reach an agreement strongly supported by the ECJ is limited to the collective redundancies directive or is rather the enunciation of a more general principle that is applicable to all situations in which the formula “with a view to reaching an agreement is used”. This is a question that the ECJ will have to answer in future cases.

The emphasis on attempting to reach an agreement in the negotiations is also used in the *Societas Europaea* and Information and Consultation Directives. In the annex to the *Societas Europaea* Directive, part 2(c) claims that the employee representatives have the right to be informed and consulted on situations affecting their interests to a considerable extent such as – but not limited to – relocations, transfers and closures; if the management organ decides not to follow the opinion of the employees then the representatives will be entitled to a second meeting with a view to attempting to reach an agreement. The Information and Consultation Directive claims on the other hand that the consultation shall be made with a view to reaching an agreement when the management decides to implement measures leading to substantial changes in work organisation or contractual relations (art.4(4),e) Directive 2002/14). It is interesting to observe that these proactive directives use the duty to reach an agreement only in exceptional circumstances. This seems to provide an indication that the duty is exceptional (in the sense of being strictly interpreted, only in the situations expressly provided for in the Directives) and that the European Model on Worker Participation rests more on the exchange of views and social dialogue than on a type of feeble European co-determination (which is clearly refused at the EU level). This has, of course, its advantages and disadvantages: as regards the advantages, this exchange of views, the encouragement of dialogue and the flow of information might create incentives for the alignment of interests between employees and managers vis-à-vis shareholders (the so-called insider/outsider conflict) and reduce the agency costs of employees vis-à-vis shareholders (who are in a stronger position to make pressure upon the management on account of the reinforcement of their rights and the use of voting power to replace the

management board).⁴⁹⁴ As regards the disadvantages, there is the danger that the flow of information might serve simply as a means of paying lip-service to the employees and avoiding stronger commitments. Only time will tell the advantages of each system.⁴⁹⁵

One transversal question that is currently pending before the ECJ consists in the timeliness (*zeitpunkt, temps utile*) of the intervention. The question is: should the employer initiate the information and consultation procedure (whether or not with a view to reaching an agreement) before any decision is taken or is the managerial prerogative untouchable and the employees will simply be entitled to state their views on the question or bargain the consequences of its implementation. The directives are silent on this question: it is logical that the information shall always precede the consultation but it is not obvious at which moment the employer is obliged to provide the information in order to hear the opinion of the employees or bargain. The ECJ provided an answer to this question in the case *Akavan*.⁴⁹⁶ The ECJ ruled that the employer is under a duty to engage into dialogue under the Collective Redundancies Directive whenever it adopts measures that might give rise to collective redundancies independently of the fact that it is able or not to provide the undertaking with all the information required by the Directive. The relevant elements consist in (1) the adoption of the measures and (2) the likeliness of those measures to contemplate collective redundancies. If the company is organised as a group of companies with independent legal personality, the duty to initiate the consultations falls with the subsidiary affected by the measure once that subsidiary has been identified. This is a very protective measure of

⁴⁹⁴ Gospel, H. and A. Pendleton, Eds. (2005). Corporate Governance and Labour Management - an international comparison, Oxford, Höpner, M. (2005b). "What connects Industrial Relations and Corporate Governance? Explaining institutional complementarity." Socio-Economic Review 3(2).

⁴⁹⁵ Seitz, K. (2004). Europäisches Rahmenrecht für eine Europäische Betriebsverfassung - stand und perspektiven. Tübingen, Köhler-Druck, Laulom, S. (2005). Le cadre communautaire de la représentation des travailleurs dans l'entreprise. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne.

⁴⁹⁶ *Akavan Erityisalojen Keskusliitto AEK and Others* (C-44/08). This ruling concerned a situation in which a parent undertaking located in another member state decided to terminate the activities of one plant located in Finland. The Finish employees contested the collective redundancy claiming that the the employer had not engaged into dialogue "*in due time*" in order to seek for real alternatives to the closure.

the employees that safeguards the autonomy of the employer to undertake the decisions while it obliges him to go through a number of procedures destined to safeguard the interests of the employees in order to implement them.

(c) European Law, the macro-economic environment and firm organisation – this section must be completed with a short reference to the context in which this European regulation was enacted. The reactive directives were implemented in the second half of the 1970s, a time in which the idea of coordinated capitalism had reached an end and the new monetarist policies initiated their first steps. It was equally a time of increasing shareholder activism as the movement of mergers, acquisitions and takeovers revealed and in which the fordist production structures initiated their dismantling and the new forms of work organisation debuted. This trend continued throughout the 1980s and 1990s. This gave birth to a number of agency costs of managers vis-à-vis employees. Since the institutional equilibrium between managers and shareholders had been displaced in favour of stronger shareholders and a more financially oriented management, the work organisation structures had to adapt correspondingly to the new institutional endowment. As it was referred above, the purpose of the organisation of work is to reduce the agency costs that occur between managers and employees by means of information failure: since the objective was to organise production in such a way as to make firms more responsive to shareholder demands and a fluctuating macro-economic environment, the solution lay in improving the channels of communication between the management and the workforce, engaging the workforce into the life of the company and encourage them to adapt new work procedures to adopt new forms of work organisation to make companies more profitable. This is clearly stated in the preamble to the Charter of Fundamental Social Rights of Workers and the Information and Consultation Directive. This provides us with a strong indication that the new institutional equilibrium between management, shareholders and employees lay not in a radical division of work characteristic of the fordist production unit but in an improvement of the channels of communication between managers and employees in order to accommodate the management of the company to a fluctuating macro-economic environment (with several ups and downturns) and to the increasing financial demands of the shareholders. This is particularly visible in the evolution from the reactive

directives (which were the only employee participation directives from the 1970s to the beginning of the 1990s) to the proactive directives (who knew a renewal of interest from 1994 onwards with the approval of the European Works Council). Therefore EC Law seems to bet on social dialogue at the level of the company and a partnership approach of social dialogue between employees and managers in order to reduce the agency costs within the firm. This leads us to conclude that there is room for adaptability and limitation of the unilateral power of the employer in terms of the compromise between the shareholders and the management.

5.2.1.3 Conclusion

This explanation of the regime concerning the regulation of employee participation at the European level is capable of allowing us to extract some conclusions. Employee participation at the European level is made by three means: rights to information, consultation and consultation with a view to reaching an agreement. The analysis of these rights must begin at the fundamental rights level contained in the several charters of fundamental rights. The Charters recognise rights to information and consultation to the employees. Although they are not directly enforceable because they do not provide employees with self-executing rights, this does not mean that they are deprived of practical application however: the Community Charter of Fundamental Social Rights for Workers – a purely soft law instrument – inspired the majority of the employee participation directives that were approved or revised in the 1990s and 2000s. The European Social Charter and the Charter of Fundamental Rights have a practical application because they are binding at all times during the action of the public authorities. This provides them with an extremely important double effect: (a) imposing a permanent duty to act and respect their provisions by the public authorities (in their legislative, administrative and judicial activities) and (b) limiting the deregulatory impact of national and European measures.⁴⁹⁷ The Employee Participation Directives made the practical implementation of these rights at the European level. These Directives may be classified into two great groups: reactive and proactive. The

⁴⁹⁷ As it was stated by Bruno de Witte in Witte, B. d. (2005). *The Trajectory of Fundamental Social Rights in the European Union*. Social Rights in Europe. G. De Búrca and B. d. Witte, Oxford.

reactive directives were designed to provide employees with a weapon to answer situations of entrepreneurial crisis (collective redundancies and transfer of undertakings). The proactive directives have a much broader scope of application: they intend to encourage social dialogue at the level of the company by means of an exchange of views over various subjects that concern the situation of the company. These Directives have several communalities and differences: as regards the communalities, these directives are underpinned in two basic elements: (a) mandatory company-level employee representation (b) information and consultation procedures. As regards the differences, these common elements are diversely regulated across the several directives. The actors in the proactive directives are essentially those that represent employees at the national level; although this might provide pre-existing structures of employee representation with new rights (and be a factor of evolution as Sylvaine Laulom cunningly observed),⁴⁹⁸ they did not modify structurally the national laws.⁴⁹⁹ That is not the same thing with the proactive directives: since the majority of them are applicable to multinational companies – an almost unregulated terrain in terms of labour rights – they set up new structures for the representation of employees; only the European Works Council Directive seems to allow the evasion of the duty to set up an European Works Council by means of art.6(3) and 13 of Directive 94/95, although the duty to consult seems to presuppose an alternative mechanism of representation. The ECJ has had the occasion to state its imperativeness for an effective system of representation of employees at the level of the company, as the case law referred above illustrates. The procedures equally exhibit a great degree of differentiation. The reactive directives (and Directive 2002/14) provide for rigid procedures laying out in detail the terms of the procedure. Since they are applicable at the national level, there was the concern to lay out in detail these procedures so that the transposition of the Directives could have

⁴⁹⁸ Laulom, S. (2005). Le cadre communautaire de la représentation des travailleurs dans l'entreprise. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne.

⁴⁹⁹ With the exception of the UK, a country where the reactive directives had the most profound impact and radically altered the system of participation by eliminating the tradition of voluntarism. See Davies, P. L. (1994). "A challenge to the single channel." Industrial Law Journal **23**: 272 ff, Addison, J. T. and W. S. Siebert (2002). Changes in collective bargaining in the UK. Bonn, Forschungsinstitut zur Zukunft der Arbeit.

a practical effect at the national level (and avoid a repetition of Commission vs UK); that was the reason why Sylvaine Laulom claimed that it was a procedure more concerned with rights than actors, although the rights provided to those actors are capable of bringing an evolution at the national level.⁵⁰⁰ The proactive directives preferred a flexible system of information and consultation to be agreed in an ad hoc procedure by the employee representatives. The differences between the procedures are not exhausted in the regulatory technique however: the terminology and the duties contained in them also vary to a great extent. The duty to inform is rigidly laid out in the reactive directives, whereas the proactive directives prefer broader formulas. The duty to consult is also differently regulated: this duty in the reactive directives is accompanied with the expression *“with a view to reaching an agreement”*, an expression almost absent in the proactive directives. The reasons behind this regulatory difference are easy to guess: since the reactive directives are applicable only to situations of crisis, the stress is placed upon the agreement; the proactive directives prefer a more permanent dialogue and exchange of views and only mention the duty to reach an agreement in situations in which the interests of the employees are capable of being affected to a large extent (becoming in this sense almost reactive). The macro-economic and firm organisation context in which these directives were enacted are also interesting: they were enacted in times of modification of the economic model, shareholder activism and modifications to the structures of firms; the EU believed that the answer to those challenges lay upon social dialogue at the level of the company.

A final word must be given to the positions of Marie-Ange Moreau: the author analysed the approach of the EU in the framework of the internationalisation of companies and concluded that this body of statutes represents an innovative approach to the social challenges raised by the internationalisation of companies in the common market. Considering that the companies are active internationally and the social regulation remains essentially national, there are considerable agency costs between managers, shareholders and employees because one decision is capable of having a variety of social impacts in several distinct jurisdictions. The solution lays in an

⁵⁰⁰ Laulom, S. (2005). Le cadre communautaire de la représentation des travailleurs dans l'entreprise. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne.

innovative approach that was implemented in accordance with the principle of concordance of scope, time and action, which claims that the power of shareholders and managers in an unregulated space needs an appropriate counterbalancing answer. The answer is based upon the setting up of mandatory employee representation in international companies capable of representing the interests of all employees affected and in the setting up of appropriate information and consultation procedures; these procedures are to be bargained between the parties having in mind their specific circumstances although the employees are always underpinned in fallback provisions. This is an expression of reflexive regulation in order to fill-in the social vacuum of the transnational activity of companies.⁵⁰¹

The conclusion to be drawn from this puzzle of legal sources can be the following: the EU believes that social dialogue at the level of the company and the engagement of employees into the life of companies is the best means to provide an answer to the challenges of the economic model that initiated after the 1970s and brought managers under an increasing pressure from the shareholders to restructure and provide financial results. This led to a realignment of interests between managers and employees in order to provide an answer to the demands of shareholders. This was achieved by means of the recognition of rights to information and consultation at various legal sources. These rights may be summoned into two large groups: (a) rights of consultation with a view to reaching an agreement in situations of crisis or that affect the interests of employees to a considerable extent and (b) rights to information and consultation (merely an exchange of views). These rights are recognised both at the national and multinational level. At the national level, the strategy bet more on rights than actors and simply provided pre-existing actors with a concrete and rigidly laid out set of rights in order to implement those directives; this recognition is expected to be a factor of evolution of the national regulations. At the international level the strategy was more flexible and simply

⁵⁰¹ Moreau, M.-A. (2001). "L'implication des travailleurs dans la société européenne." Droit Social: 967-976, Moreau, M.-A. (2006). Normes sociales, droit du travail et mondialisation, Dalloz, Moreau, M.-A. (2006). "Restructurations et Comité d'Entreprise Européen." Droit Social (March), Moreau, M.-A. (2007). The originality of transnational social norms as a response to globalisation. Regulating Labour in the Wake of Globalisation. New challenges, new institutions. B. Bercusson and C. Estlund, Columbia, Moreau, M.-A. (2008). Les échanges entre les droits, l'expérience communautaire - une lecture des phénomènes de régionalisation et de mondialisation du droit Collection Droit de L'Union Européenne. S. Robin-Olivier and D. Fasquelle.

imposed – with some limits – employee representation and left to the autonomy of the social partners the definition of the concrete arrangements to information and consultation. The end result was the promotion of social dialogue at the level of the company.

5.2.3 The Evolution of the Actors

the traditional national systems of employee representation have been undergoing a considerable evolution over the last 20 years that led to a rearrangement of the functions attributed to each one of the actors and to the creation of new actors to meet the demands of companies. This evolution is intimately connected to the evolution in collective agreements, which will be the object of analysis in the following section. This section will argue that, in a similar way that occurred at the level of European law, there has been a movement of decentralisation of collective bargaining towards the level of the company. This movement of decentralisation was achieved in Continental Europe by means of a new articulation between the actors at the level of the sector and those at the level of the company and in the UK by means of a movement of centralisation of bargaining from the level of the undertaking towards the level of the entire company. The causes of this trend of decentralisation that led to a rearrangement of the traditional function of the actors are multiple and overlapping: they must be seen within their due context and assume distinct dimensions within each distinct system. The causes of this evolution may be simplified – for reasons of exposition – in one simple sentence: the changes in the macro-economic environment (financialisation of the economy), the reinforcement of the rights of shareholders and the modifications occurred in management boards that has been taking place since the beginning of the 1980s have put a considerable degree of pressure upon managers for them to be more attentive to the interests of shareholders (including non-controlling shareholders, thus curtailing their managerial autonomy and the agreements with the dominant shareholders); this led to a rearrangement of the organisation of work in order to reduce the agency costs of managers vis-à-vis employees and make the performance of the company more responsive to the demands of shareholders. This reorganisation of work obliged to a modification of the pre-existing structures of employee

representation in order to accommodate the new demands of lean production (betting on operational and strategic decentralisation and projectification of work). This led to a reinforcement of the powers of the actors at the level of the company in each country examined and to a rearrangement of competences of the trade unions, who have been increasingly losing their exclusive monopoly in the representation of the interests of employees towards a more balanced role of determining the framework conditions at the level of the sector and supervising the agreements concluded at the level of the company in order to ensure that the institutionalisation of social dialogue at the level of the company will not result in a formalisation of the managerial predominance in collective bargaining to the detriment of employees. This comes to the interest of managers, shareholders and employees: the realignment of interest between managers and employees will allow them to agree on attempting to satisfy to the best extent the interests of the shareholders and thus preserve their position and avoid redundancies (the so-called insider/outsider conflict); but employees are equally interested in this evolution because this will allow them to supervise to a greater extent the behaviour of the management board and attempt to bargain the solution that is the least detrimental to their interests when faced with the pressure of shareholders (the so-called accountability conflict).⁵⁰² The impact of EU Law in this evolution is hard to evaluate; with the exception of the UK – a country in which the influence of EC Law has been so extensive that it has increasingly become a case-study of how EU Law can modify a national system – the influence of EU Law in the other regulations is harder to observe; the most correct observation seems to be Sylvaine Laulom's observation that the rights-based approach of EU Law has been serving as the seed of change of a traditional system and that the forthcoming modifications will occur by means of a spill-over effect.⁵⁰³ As we can see, the sources of influence and transformation are multiple and hard to observe in an isolated

⁵⁰² Kirr, B. Corporate Governance und Arbeitsbeziehungen in Deutschland, Großbritannien und Polen, Gospel, H. and A. Pendleton, Eds. (2005). Corporate Governance and Labour Management - an international comparison, Oxford, Höpner, M. (2005). Corporate Governance in transition: ten empirical findings on shareholder value and industrial relations in Germany, Max Planck Institute für Gesellschaftsforschung.

⁵⁰³ Laulom, S. (2005). Le cadre communautaire de la représentation des travailleurs dans l'entreprise. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne.

manner. The following lines will attempt to illustrate the evolution of each national system and demonstrate the evolution registered towards the creation of new spaces of manoeuvre for the actors at the level of the company.

(a) Germany – Germany has experienced since the beginning of the 1980s a remarkable evolution in the traditional functions of employee representation. This evolution was remarkable because – unlike the remaining countries – it did not consist in the creation of new actors (with the exception of the *Arbeitsgruppen* in the new §28aVBG) but simply in the adaptation of the existing employee representative structures to the challenges of new realities. The former paragraphs mentioned that the German system of employee representation was underpinned in a sharp division of competences between the trade unions (who had the monopoly at the level of the sector and represented employees as a class, regulating the substantive working conditions at the level of the industry) and the works councils (who represented employees at the level of the company as stakeholders). This sharp division of competences became under attack since the beginning of the 1980s. The reasons behind the increasing critics to the traditional balance of the system lay in its inadequacy to the structural changes that occurred since the end of the 1970s. The modifications in the macro-economic environment, the patterns of corporate governance and the organisation of companies (that placed an increasing demand upon managers to deliver shareholder value) demanded an increasing level of flexibility and differentiation in collective agreements. The current practice of collective bargaining was unable to present an answer to the challenges of the time and began to loose its capability to perform its functions. The employers criticised the rigid wages and the rigid standardisation of work laid down in industry level agreements because it did not fit to the particular demands of their companies. In addition, the current practice of collective agreements had the effect of benefiting the insiders (*i.e.*: persons that already had a stable job within companies) at the cost of outsiders (persons that had a flexible contract with the company or that worked in outsourced companies working exclusively for the central company) because they were able to raise their wages above the level of the market by putting pressure upon persons with unstable positions to accept lower wages and precarious working conditions under fear of loosing their employment. The answer lay in a

decentralisation of the employee representation towards the level of the company. The advocates ⁵⁰⁴ of this solution praised the fact that the decentralisation of employee representation towards a reinforcement of the powers of the actors at the level of the company brought with it numerous advantages: it could reduce the transaction costs of managers vis-à-vis employees in the channels of information within the company; it could assist in the implementation of lean production – with the consequential advantages in flexibility - while maintaining employee representation, it could create incentives for the investment in human capital that is characteristic of the German system of corporate governance and it could provide companies with instruments of flexibility (particularly in wages and working time) in order to be able to face the economic fluctuations of the time, the demands of shareholders and the capacity of companies.

This decentralisation of collective bargaining towards the level of the company was achieved by means of an adaptation of the actors and of the collective agreements.⁵⁰⁵ This emancipation was made by several distinct means that must be contextualised in order to understand the reasons behind their development and their importance. As it has been laid out several times throughout this thesis, the German system of employee representation has a core actor at the level of the company – the works council. The works council and the trade unions have a statutorily mandated strict division of tasks in order to safeguard the representative functions of each body and avoid overlapping functions. This separation was strongly supported by the employers who wanted to avoid bringing social conflicts into the company. The key provision here was §77(3)BVG; this provision barred the works council from determining the conditions of work when those conditions were previously laid out in a collective agreement applicable to the industry. The concern to avoid free-riding

⁵⁰⁴ Artus, I. (2001). Krise des deutschen tarifsystems - die erosion des flächentarifvertrags in Ost und West, Westdeutscher Verlag, Berthold, N. and O. Stettes (2001). Der Flächentarifvertrag - von wegbereiter der Wirtschaftswunders zum Verursacher der Beschäftigungsmisere. Ökonomische Analyse des Arbeitsrechts. C. Ott and D. Schäfer, Mohr Sibeck, Nagel, B. (2001). Tarifstrukturen und Zukunft des Flächentarifvertrages im Deutschland. Ökonomische Analyse des Arbeitsrechts. C. Ott and H.-B. Schäfer, Mohr Sibeck.

⁵⁰⁵ This section will be concerned with the description of the emancipation of the actors; the agreements will be the object of the next section. Several references will be made to collective agreements however because one cannot truly understand its function in an isolated manner; the details of the evolution of the agreements will be laid out further on.

and ensure the effective application of the industry level agreement to all the companies of the sector was so strong that the provision was applicable even if the company was not a part to the agreement in one of the few deviations allowed from the principle of double affiliation. This meant that as long as wages and working conditions were normally (*üblicherweise*) regulated in a collective agreement applicable to the sector, the works council would be barred from determining it at the level of the company independently of the affiliation of the employer. The key concern here was to ensure the monopoly of trade unions in the determination of the wages and working conditions.⁵⁰⁶ The challenges of the 1980s led employers to contest to an increasing extent this solution because they thought that collective agreements were no longer capable or providing for a solution to their problems and wished to determine the working conditions directly with the works council free from the coverage of collective agreements. The inadequacy of the limits laid down in §77(3)BVG and its progressive disregard in practice were more than evident in three widely debated cases: *Viessman*, *Holzmann* and *Burda*. The *Viessman* case dates back to 1996 and concerns an agreement with the works council (further approved by 96% of the employees in a plebiscite) in which the employer increased the working time of the employees without an increase in remuneration in exchange for not delocalising a company. The trade union opposed the agreement but undertook no effective actions. The *Holzmann* case concerns an insolvent company that bargained a recovery plan that contained the following clause: the employees would accept to work five extra-hours per week without an increase in remuneration in exchange for the preservation of their jobs; the employees could nonetheless set up a working-time account in which the extra-hour would be accounted and compensated with supplementary rest when the situation of the company improved. Although the agreement met the opposition of the trade unions, it had no practical effect because the company was liquidated in the end. The last case was the widely discussed *Burda* decision: this case concerns a company that concluded an agreement with the employees in accordance to which the employees would

⁵⁰⁶ Schaub, G. (1996). Arbeitsrechtshandbuch - systematische darstellung und nachschlagewerk für die praxis, C.H Beck, Däubler, W. (2002). Betriebsverfassungsgesetz: kommentar für die praxis, Bund Verlag, Däubler, W. (2006). Das Arbeitsrecht - die gemeinsame Wahrung von Interessen um Betrieb, Rowohlt Taschenbuch Verlag

increase their working time to 39h per week without an increase in remuneration in exchange for giving up redundancies and a delocalisation. Unlike the previous cases, the Burda case reached the courts and the BAG took a widely discussed decision: when the BAG was asked to discuss the interpretation of the *principe de faveur* (*Günstigkeitprinzip*) (§4(3)TVG) between the collective agreement and the labour contract, the BAG decided that the employees could not be placed in such a position because the choice between wages and job security are not comparable (“one cannot compare apples and peaches”, in the ruling’s words). Nevertheless by deciding that that this rule would be applicable only to affiliated employees, it deprived the ruling of most of its practical effect because it in fact legalised an escape to the collective agreement (and §77(3)BVG) by means of the un-affiliation of the employees.⁵⁰⁷ This decision of the BAG opened the doors to a line of cases that in fact legalised the escape from the collective agreement by indirect means. The higher courts admitted that the employer concluded an informal agreement with all the employees concerning the matters subject to a collective agreement; as long as that agreement was not qualified as a company-level agreement (*Betriebsvereinbarung*) concluded with the works council and the employees were not affiliated to the trade union in question then the “*informal agreement*” could deviate from the industry agreement and therefore overcome the limit laid out in §77(3)BVG. This was an indirect means of empowering the works council by opening doors to the deviation from the industry level agreements and

⁵⁰⁷ Kriebel, V. (1984). Zentralisation und dezentralisation im Tarifsysteem - möglichkeit und rechtliche Zulässigkeit einer dezentralisierten Tarifpolitik. Berlin, Duncker & Humblot, Hassel, A. (1999). "The erosion of the German system of Industrial Relations." British Journal of Industrial Relations 37(3): 483-505, Bispink, R. and T. Schulten (2003). "Decentralisation of German collective bargaining - current trends and assessments from a works and staffs council perspective." WSI Mitteilungen(special issue): 24-41. Waas, B. (2007). Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives - Germany Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives. R. Blainpain, Kluwer: 17-41.

bringing social dialogue into the company so that the interests of managers and employees could be aligned in times of trouble.^{508 509}

The lawmakers and the trade unions understood the potential reach of these decisions and decided to undertake measures to fight a potential voidness of the trade unions. One of the most relevant measures took place in 2001 in the reform of the BVG and consisted in an enlargement of the cases in which the collective agreements could increase the powers of the works councils. The key provision here is the new version of §3BVG that is expected to create incentives for the decentralisation of social dialogue to the level of the company with the assistance of the trade unions. The new version of §3BVG, introduced in the reform of 2001, had the intention of creating incentives for the setting up of ad hoc employee representative structures. The trade unions had been demanding since the beginning of the 1980s a reinforcement of social dialogue at the level of the company; the trade unions understood that the structural changes that were occurring were favouring more company specific

⁵⁰⁸ Rémy, P. (2004). Une redistribution des compétences entre syndicats et conseils d'établissement en Allemagne. Récomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint Étienne.

⁵⁰⁹ This solution deserves a further explanation. §77(3)BVG prohibited the works council from deviating from the provisions of the collective agreement (independently of affiliation) in question of wages and substantial working conditions in order to safeguard the Constitutionally recognized power of the trade unions. This prohibition is extensive to other agreements celebrated by the works council that do not take the form of a *Betriebsvereinbarung* such as the *regelungssabrede* (regulatory arrangement). But the provision of the statute (that regulates the relations between the employer, works council and trade unions) is not applicable to the relations between an employer and employee. Those relations are subject to the TVG that demands in its §4TVG the affiliation of the employee to the trade union to take effect. If the employer concluded directly with the non-affiliated employees an agreement providing for a deviation from the collective agreement then it will not be captured neither by §77(3)BVG nor by §4(3)TVG. The problem lays with the trade unions' right of action. In principle, German trade unions do not have a statutory right of action against individual employers who deviate from the terms of an agreement; they must pressure the employers' association (who is the party to the agreement) to pressure the employer to abide by the agreement. The BAG opened an exception however and recognized in the *Burda* decision a direct claim of unions against individual employers in these situations of an escape to a collective agreement in order to defend unions' constitutional right to freedom of association. Nevertheless the union can act only in the name of its members; it cannot act in relation to all members because collective agreements are applicable only to affiliated employees. Since unions do not want to disclose the identities of their affiliates and they fear that this will lead to an escape from affiliation, they generally refrain from undertaking collective action in the name of their affiliates. The result is an indirect permission of these agreements by means of the principle of affiliation. Although the construction is artificial it is nonetheless effective. See Waas, B. (2007). *Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives - Germany Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives*. R. Blainpain, Kluwer: 17-41. and Däubler, W., M. Kittner, et al., Eds. *BetrVG mit Wahlordnung und EBR-Gesetz*, Bund-Verlag.

measures and placed a great challenge to the traditional system of industry level bargaining that had been one of the pillars of the German economic success; company level social dialogue was seen as the most secure means of ensuring employee influence at the future.⁵¹⁰ The problem lay in guaranteeing that the trade unions would not be left out of the picture and ensure them a significant role in this decentralised social dialogue. The new version of §3BVG is the result of those efforts and its solutions attempt to strike a balance between the need to increase social dialogue at company level and the guarantee of the power of the trade unions. The essence of the provision consists in providing a means for the employer and the employees to bargain more specific employee representative structures. In the event that the catalogue of structures offered by the law is inadequate to ensure an effective employee influence in the decision-making structures of the company, §3BVG allows trade unions and employers to bargain a company specific representative structure. Before analysing each one of the distinct possibilities of adaptation, there is a need to make two preliminary remarks: firstly, the statute uses throughout the provision the formula “*as long as it is necessary to serve an objectively justified interest of the workforce*”.⁵¹¹ This means that this possibility is always subsidiary to the statutory representative structures and that its enactment is dependent of a demonstration of the interest of the employees in setting up an ad hoc structure. Secondly, the new employee representative structures must be in principle set up by means of a collective agreement concluded with a trade union. This agreement will normally be a company-level collective agreement (*i.e.*: concluded between a trade union and an employer) because the practical effects of the provisions are thought for specific companies. The only situation in which the employees may bargain the setting up of a new representative structure directly with the employer occurs when the company is not under the influence of a collective agreement (§3(2) BVG). The preference given to the trade unions is not strange and must be understood in its due context. The trade unions have a constitutionally

⁵¹⁰ Kriebel, V. (1984). Zentralisation und dezentralisation im Tarifsystem - möglichkeit und rechtliche Zulässigkeit einer dezentralisierten Tarifpolitik. Berlin, Duncker & Humblot, Lessner, J. (2005). "Chancen dezentraler Tarifpolitik - herausforderungen für die gewerkschaftliche Willensbildung." Recht der Arbeit(5): 285-294.

⁵¹¹ “*Wenn dies die sachgerechten Wahrnehmung der Interessen der Arbeitnehmer dient*”.

recognised role in Germany of regulating the labour market by means of collective agreements and by means of a delegation of the State to the social partners of the task of regulating the labour market. This role was recognised in §1TVG when the statute fit the task of regulating the “*company constitution matters*” within the competences of the trade unions. But it is equally interesting to observe that the attempt to decentralise collective bargaining in Germany by means of §3BVG did not result in a diminution of the power of trade unions: the unions still have the preference in bargaining the employee representative structures by means of (presumably) company-level agreements thus ensuring that the decentralisation of bargaining does not result in a diminution of the powers of the employees.⁵¹²

The new version of §3BVG provides that trade unions may set up complementary employee representative structures in several situations; the most important ones, for the purposes of this thesis, consist in (1) in companies with several undertakings, (2) in companies or groups of companies organised in specialised departments gifted with decision-making capacities (§3(1), n°.1 and n°.2 BVG). As regards the first situation, when the company is divided into several undertakings, the law offers the possibility for the employer and the trade union to agree to set up a structure representative of the employees of all the undertakings or to unite undertakings. The purpose of the regulation is more than evident: it intends to facilitate the possibility of representation of the employees in front of the employer. This possibility seems awkward because the BVG provides in its §47 for the election of an enterprise works council (*Gesamtbetriebsrat*), which consists in a representative structure composed by representatives of the minor works councils; each undertaking would have to elect its own works council and then send to the enterprise works council a representative that would coordinate the activities of the minor works councils. This possibility of deviation from the election of a *Gesamtbetriebsrat* must be understood at the light of the intention of facilitating social dialogue at the level of the company. The enterprise works council is an indirectly elected organ whose competence is limited to affairs concerning the whole company. It

⁵¹² See the comments of Däubler, W. (2001). "Die novellierte Betriebsverfassung." *Industrielle Beziehungen* 8(4): 364-378, Däubler, W. (2002). *Betriebsverfassungsgesetz: kommentar für die praxis*, Bund Verlag, Däubler, W. (2006). *Das Arbeitsrecht - die gemeinsame Wahrung von Interessen um Betrieb*, Rowohlt Taschenbuch Verlag

presupposes a previous election of works councils in the participating undertakings and therefore imposes a duplication of costs. The possibility to set up a directly elected works council avoids this duplication of costs and provides the works council with the possibility to bargain any affairs that concern the employees of the company (and not just those that concern all the company); it is equally a much stronger bargaining partner because it directly represents all the employees of the company even if the issue at stake only concerns one or some of the undertakings of the company. This possibility was designed to strengthen social dialogue in small and medium companies with decentralised organisational structures where the setting up of both works councils and an enterprise works council would be too burdensome. On the other hand, the setting up of this structure projects the issues concerning the workforce at the level of the organisation (and not the undertaking) thus strengthening social dialogue at company level. Alternatively, the social partners may agree to consider the several undertakings in which the company is divided as only one undertaking for the purpose of the election of the works council and therefore avoid the dual-regime that the enterprise works council implies. That would be the case for example of one company with one decision-making structure and several geographically dispersed units: since the meeting with the works councils of each one of these unions is unlikely or unfeasible then the trade unions may propose to consider them as one single undertaking for the purpose of the election of a works council that is nearer to the management.⁵¹³

The second situation is quite distinct as it points towards the facilitation of social dialogue in companies in which lean production had been thoroughly implemented. §3(1),nº.2 BVG authorises the trade unions to bargain alternative representative structures in companies that are organised in specialised departments (*Sparten*) in accordance to the product or project with a certain degree of autonomy in decision-making. This provision allows either for the setting up of alternative representative structures in each one of the *sparten* in order to allow employees to enter into a direct dialogue with the management or the reunion of all the employees of the several *sparten* into one company for the purpose of the election of the works council. The founding stone of this

⁵¹³ Däubler, W. (2002). Betriebsverfassungsgesetz: kommentar für die praxis, Bund Verlag, Däubler, W. (2006). Das Arbeitsrecht - die gemeinsame Wahrung von Interessen im Betrieb, Rowohlt Taschenbuch Verlag

provision is the division of the company in sections (*sparten*). These sections must refer either to the product or to the project; other divisions that are unrelated to these elements (such as clients, market segments, distribution) are irrelevant when they have no indirect connection to those two elements. The functional division of companies in production, distribution and services are equally insufficient to allow a collective agreement to set up a separate representation. The reference to the very expressive concept of *sparten* intends to make a direct appeal to the application of the principles of lean production to the activity of companies; the activity of the company is divided into products or projects with a substantial degree of autonomy within the company up to the point that they may be considered as independent units within an overall company. This brings us to the second requirement for the setting up of an ad hoc employee representative structure: the management of the division must act as the functional employer of the division. The statute makes reference to the managerial decisions in situations subject to employee-influence procedures. This means that the division must have some kind of autonomous direction that will act as the functional employer. This does not mean however that the direction must be autonomous in the sense of having the responsibility and autonomy to undertake the decisions that it sees fit to the management of the company. This provision is also applicable when the management is under the direct influence and dependency of higher layers of hierarchy and merely implements the decisions undertaken at those higher levels. The most relevant thing to retain is that the management of the product or project division must have some kind of directory power that is capable of stimulating employee influence rights. One may make a distinction between the competence to run the division (*Spartenleitung*) and the competence to run the business (*Betriebsleitung*) in order to understand the level of autonomy required to implement this provision: it is enough that the management of the division exercises some kind of managerial prerogatives (even if to a limited extent) to be qualified as a manager for the purposes of the provision and allow for the setting up of this alternative representative structure. A final word concerning this possibility is imposed: similarly to what was described in the previous section, the setting up of a representative structure at the level of the product or project is destined to substitute the competent representative (the works council, global works council, (*Gesamtbetriebsrat*), group works council

(*Konzernbetriebsrat*) in its functions. The representative becomes an autonomous organ for the performance of the task of employee representation having regard to the particular organisation of the company. The law equally admits the possibility of setting up complementary organs in the sense of ancillary employee representatives structures whose job is not to replace the competent representative but simply to assist it in the performance of its job. §3 (1), n°4 and n°5 BVG make an express reference to them. Those contained in n°4 are thought to coordinate the actions of employee representatives in several companies; they are particularly useful in areas undergoing heavy restructuring procedures in which the coordinated action of the employees is useful; those contained in n°5 are a simple reference to complementary structures that assist the works council in its relationship with the employees. In similar terms to the structures that have been described here, they must be agreed with the competent trade union by means of a collective agreement.⁵¹⁴

The organisation of the company in accordance with the principles of lean production led the German lawmaker to introduce another provision in the BVG that is thought to adapt the structures of representation of employees to those procedures. That provision is §28aBVG, which concerns the delegation of tasks to groups of employees (*Arbeitsgruppen*). This provision authorises the works council of companies with more than 100 employees to delegate certain of its tasks to groups of employees (*arbeitsgruppen*) as long as the delegated tasks have some connection to the activity exercised by that group. This empowers the group of employees to conclude agreements with the employer subject to the same requirements at the agreements concluded by the works council (§28aBVG). This provision – which was newly introduced within the BVG – intended to strengthen the position of specific groups of employees within the company whose interests were not adequately safeguarded by the works council without undermining the position of the works council. Therefore its function is not to compete or to substitute the works council but to assist it in the function of employee representation by assuming some of its powers in areas gifted with sufficient autonomy; this explains the resource the concept imported from Administrative Law of *Übertragung* (delegation), i.e: the transfer

⁵¹⁴ Däubler, W. (2002). *Betriebsverfassungsgesetz: kommentar für die praxis*, Bund Verlag, Däubler, W. (2006). *Das Arbeitsrecht - die gemeinsame Wahrung von Interessen im Betrieb*, Rowohlt Taschenbuch Verlag

of powers from one entity to another because the interests at stake advise that the more specific entity should have the power to assume the decisions. This provision is an answer to the demands of the praxis that employees assume more direct forms of participation within companies. The concept of “*group of employees*” is to be interpreted as broadly as possible covering both team and project work as well as determined occupational activities. They may be defined as self-regulatory organisational entities within the company that implement the planning, direction, implementation, coordination or control of their activity (defined in occupational terms by reference to a task) with a variable degree of autonomy. The most relevant thing is the identification of a concrete group of employees that may be detached from the remaining company on account of their autonomy and discretionarity due to the activities exercised. The key provision here is §87(1),nº13 BVG, which defines groups of employees as “*a group of employees that performs essentially in their own responsibility a task delegated to them in the context of the organisation of work within the company*”. Therefore they must have some kind of autonomy in the determination of their work (even if partial). The concept does not cover organisational units (even if perfectly detached) that enjoy no autonomy in the determination of their work and merely perform tasks commanded from above.⁵¹⁵ The delegation must be made by means of a written agreement with the works council that will determine which groups will assume the tasks of the works council and which powers will be transferred to the group. The requirement of an agreement is made to avoid pressures from the employer and an undermining of the powers of the works council (*divide et impera*). In order to avoid pressures of the employer and to ensure that the transfer obeys genuine occupational requirements, the works council is free to revoke it at any time (§28aBVG). The tasks delegated to the *arbeitsgrupp* must have some kind of intimate connection with the activities exercised by the group in order to facilitate the management of human resources in the company and make it more competitive. The group will be empowered to bargain a group agreement (*gruppenvereinbarung*) with the employer in order to negotiate the more relevant questions. This agreement is able of covering any of the tasks of the works council delegated to the *arbeitsgrupp* and issues of the specific interest

⁵¹⁵ Däubler, W. (2002). Betriebsverfassungsgesetz: kommentar für die praxis, Bund Verlag.

of the *arbeitsgrupp*, such as the improvement of communication channels between the employer and the group.

This short description of §28aBVG allows us to understand how the representation of employees is being increasingly adapted to the new realities of the organisation of work. The works council represents employees as a unitary group in front of the employer; the reality is that the employees are increasingly becoming a diversified group with distinct interests; the introduction of lean production and the consequential autonomy that the organisation of work in projects and teams entails demands a reconfiguration of the organisation of employee representation. In order to avoid that this reorganisation would entail an undermining of the works council and a weakening of the representation of employees, the lawmaker surrounded the setting up of these structures with cautions: they only have the competences that the works council delegated to them (implying that the competence remains in principle with the works council and that the competence of the *arbeitsgrupp* is merely subsidiary) and those competences may be revoked at any time. But within the framework of their competences, the *arbeitsgruppen* will be entitled to conclude all the agreements with the employer necessary for the performance of their tasks and therefore improve the communication channels within the company.⁵¹⁶

There is one last relevant aspect that considerably modifies the position of employees within companies and contributes directly to social dialogue at the level of the company, which consists in the increasing unionisation of works council members. The functional division of tasks between the works councils and the trade unions traditionally advised against the unionisation of the works council; there were fears that it would open doors for the internalisation of

⁵¹⁶ The introduction of §28a BVG has given rise to a considerable discussion on the modifications and the impact that it is liable to bring to the traditional function of the works council, who had the monopoly of employee representation within the company. The general remarks seem to be positive because the delegation was accompanied with several safeguards to avoid a fragmentation (and weakening) of employee representation. See the studies of Däubler, W. (2001). "Die novellierte Betriebsverfassung." *Industrielle Beziehungen* 8(4): 364-378, Natzel, I. (2001). "Die delegation von aufgaben an Arbeitsgruppen nach dem neuen §28a BetrVG." *Der Betrieb*(25): 1362-1364, Däubler, W. (2002). *Betriebsverfassungsgesetz: kommentar für die praxis*, Bund Verlag, Blanke, T. (2003). "Arbeitsgruppen und Gruppenarbeit in der Betriebsverfassung - direkt demokratische Mitbestimmung als "zweiseitig paktierte Delegation"." *Recht der Arbeit*(3): 140-155, Busch, M. (2003). *Arbeitsgruppen und gruppenarbeit im Betriebsverfassungsgesetz*, Tenea, Däubler, W. (2006). *Das Arbeitsrecht - die gemeinsame Wahrung von Interessen um Betrieb*, Rowohlt Taschenbuch Verlag

social conflicts within the company and that the function of the trade unions (which consists in defending employees as a class) could be undermined by the unionisation of the works council (who do not bargain as a class but as stakeholders of the company). The modifications in the structure of companies and the increasing demands for decentralisation of collective bargaining towards the level of the company obliged trade unions to rethink their strategies. The function of the collective agreement as a pacifier of the labour market was questioned and employers made increasing demands for flexibility at the level of the company. This raised a danger: there was the peril that the demands for flexibility by the employer could turn out in social inequalities within the company and by an employer predominance in the running of the business of the undertaking, which would be extremely hazardous for the stakeholder orientation that German statutes intend to implement. One answer lay in overcoming the traditional distinction of roles and unionising the works council. There were several advantages to this trend: firstly, the works councils could benefit from the support and the advice of the trade unions when conducting their bargaining (which is extremely important in derogatory agreements, to be analysed in the next section) because the trade unions have more experience and information to be able to efficiently bargain the best solution. Secondly, the statutory protection that German law affords not only for the performance of jobs in representative bodies but also on account of union membership helped employees to feel safer when performing their tasks; if we combine these two elements, employees tended to feel “safer” in their jobs when they had the backing of a union. Thirdly, the unionisation of works councils also provided trade unions with important and reliable information on the concrete financial situation of companies that could assist in designing their *Tarifpolitik* for the industry or company-level bargaining of collective agreements.

This unionisation of the works council led to the development of a typology of the relationships between the works council and the trade unions in order to understand the various methods by means of which the two bodies influenced one another reciprocally. These relationships could be classified as an Entanglement (*Verschränkung*) or Dependency (*Abhängigkeit*). There is a situation of entanglement when the trade unions and the works councils have a close cooperation, which may be interpreted as a reciprocal benefice in the

context of a relatively autonomous company strategy. Although there is a formal distinction between the works council and the trade union in their position and jobs, the reality is that there is a close relation between these bodies in the performance of their jobs that is cemented by means of several communication channels. The communication channels between both bodies serve to assist the works council in the performance of its job and, in that context, in the performance of the *Tarifpolitik* of the trade union. There is a substantive integration of the works council in the trade union in order to ensure an effective connection to the collective agreement. The works council informs the trade union of the situation of the company and requires its assistance in the performance of its job; the trade union assists the works council in the bargaining having simultaneously into account the situation of the company and of the industry concerned; in this sense, the works council is not only a stakeholder of the company but equally an instrument of the *Tarifpolitik* of the trade union. The situation of dependency refers to a distinct case that implies a close reference of the works council to the trade union in compensation for the asymmetry of powers within the trade union. The position of the works council within the company is relatively weak; the works council then recurs to the trade union in order to compensate for this asymmetry and regain its position as an interlocutor in front of the employer. Unlike the situation of entanglement however, the relationship between the works council and the trade union is unilateral; the trade union assists the works council in the performance of its tasks but does not use it as a means of introducing its *Tarifpolitik* within the company; the trade union assists the setting up of the works council but does not interfere in its functioning.⁵¹⁷

This typology of relations helps us in understanding the modifications that are occurring within the system. The trade unions and the works councils are increasingly reinforcing their communication channels in order to assist the setting up of works councils within companies and therefore reinforcing the social dialogue at the level of the company. This might lead either to an

⁵¹⁷ Artus, I. (2003). "Die Kooperation zwischen Betriebsräten und Gewerkschaften als neuralgischer Punkt des Tarifsystems. Eine exemplarische Analyse am Beispiel Deutschlands." *Industrielle Beziehungen* 10(2): 250-271. The author equally presents two other situations in which there are weaker relationships between the works council and the trade unions, which are the decoupling (*Entkopplung*) and Distance (*Distanz*). Since these relationships do not imply a cooperation between these two bodies (which is the object of this section) I opted not to include them.

instrumentalisation of the works council within the company in the performance of the *Tarifpolitik* of the trade union or in, more feebly, in the simple assistance to the setting up and performance of the normal tasks of the trade union. The end result is always the same however: the reinforcement of company level social dialogue.

This short analysis of the evolutions registered at the levels of the actors in the German system of employee representation allows us to extract a preliminary conclusion: there appears to be a movement of modification of the powers and positions of the actors at the level of the company in Germany in order to facilitate direct dialogue between management and employees. The *Burda* decision struck a strong blow to the powers of trade unions by indirectly legitimising the agreements between employers and employees that were potentially detrimental to the provisions contained in industry level agreements. The trade unions understood this trend and have been partners in this process by requiring their agreement to the reinforcement of company level representatives and to the potential undermining of the industry level agreement: firstly, the creation of new actors demands the agreement of the trade unions in a collective agreement (presumably company-level). This means that the deviations from the provisions of the BVG (which are subject to the requirement of being in the interest of the employees) must be bargained with the trade unions. Secondly, the increasing unionisation of works council members provides trade unions with a possibility of influencing the negotiations at the level of the company and with a rich source of information on the concrete situation of undertakings that may be extremely useful to the elaboration of the *Tarifpolitik*. Finally, it is unequivocal that the adaptation of employee representative structures was also thought having in mind the realities of the new forms of organisation of work: the delegation of tasks to the *arbeitsgruppen* and the setting up of ad hoc employee representative structures in companies organised in accordance with the principles of lean production (*sparten*) intends to adapt employee representation and social dialogue to the new demands of work. The end result is an expected reinforcement of company-level social dialogue.

(b) France – the French system of employee representation also exhibited a considerable evolution over the last years that have appear to have led to a reinforcement of social dialogue at the level of the company. The transformations were deeper however as it implied a modification to the statutory regulation of employee representative structures and to the traditional balance between union and non-union representation in France. The transformation in the French system of employee representation was achieved by means of a complex procedure that mixed legislation and national collective agreements; it intended to achieve a compromise between the need to improve social dialogue at the level of the company and the trade union's refusal to loose power in matters of representation of employees. The final result was a complex scheme that intends to achieve a balance between the engagement of employees in the life of the company and the safeguard of trade unions' power to control the application of labour law at the level of the company.

The French system of employee representation at the level of the company exhibits two types of representation: (a) elected and (b) designated. The elected representation consists in the works councils (*comité d'entreprise*, which is a tripartite body) and in the staff-delegate (*délégué du personnel*); the designated representation consists in the shop-stewards (*délégué syndical*). The powers of employee representatives at the level of the company are limited to rights to information and consultation because the matters of collective bargaining are reserved to the trade unions. The first transformation to this pre-established scheme came in the Auroux laws; these laws consisted in an extremely influential reform of French Labour Law that took place in the beginning of the 1980s, which set the bases for the development of social dialogue at the level of the company and influenced to a considerable extent the posterior evolution. The ambitious objective of the reform was clearly stated in a report elaborated by Jean Auroux himself in which he stated that the objective of the reform was to: (1) provide the employee with a greater and more responsible dimension within the company, (2) recognise to each one of the social partners its role and mission and (3) trust the organisation of employment relations to bargaining and contract. Each constituent element of the company (management, employees, shareholders) should be considered as a fully autonomous actor in its respective domain; the working collectivity should be reunited and the law should not regulate but rather provide room for

the social partners to adapt the management of the company to their specific needs by means of self-regulation, so that each one of the parties may exercise its own competences.⁵¹⁸ These bold statements lay out in a clear fashion the guiding lines of the reform: the labour force should no longer be considered as an outside element of the company but rather internalised into the management of the company by providing the social partners with sufficient room of manoeuvre for the bargaining of the solutions best adapted to the situation of the company. This could well be translated in a contemporary contractarian conception of the company and the emphasis on company level social dialogue as a means of reducing the agency costs of managers vis-à-vis employees and providing companies with an instrument to face the demands of the time.

The reforms undertaken by the Auroux Laws were quite extensive. Since the laws placed a great deal of emphasis on company level social dialogue by setting up employee representatives that could bargain with the employer, the actors at the level of the company were one of the most important areas of intervention. One important modification that the law introduced consisted in the suppression the thresholds of 50 employees to set up trade union sections (*section syndicale*) within the company; although the trade union section is not itself gifted with information and consultation rights, it was nonetheless important because it encouraged the unionisation and the correspondent union presence within small and medium sized companies and facilitated the setting up of a union partner within the company to initiate social dialogue. This encouragement of unionisation and union presence within the company had the merit of introducing us to the following innovation, which consisted in the replacement functions of the staff-delegate. The Auroux Laws allowed representative trade unions to designate in companies with less than 50 employees the staff-delegate as its representative; this means that the staff-delegate (*délégué du personnel*) would in reality combine both the functions of an elected representative of the personnel and of a shop-steward (*délégué syndical*). This was an extremely important innovation whose relevance should not be underestimated. The French legal thinking at the time made a distinction between the tasks of the shop-steward (which consisted in vindicating a change of rules, a task constitutionally reserved to the trade unions) and the

⁵¹⁸ Auroux, J. (1983). "Un nouveau droit du travail?" *Droit Social*(1): 2-4.

task of the staff-delegate (which was merely an interlocutor between the employer and the employees deprived on any bargaining functions; the most he could do was to protest against the inobservance of regulation within the company).⁵¹⁹ This relevance had almost no impact outside large companies on account of the meagre unionisation in the private sector (in particular in small and medium companies). The lawmaker, by recognising the existence of a trade union section in all companies – independently of the thresholds of employees – and by providing representative trade unions with the possibility to designate a staff-delegate as a shop-steward in reality created incentives for company level social dialogue because that was a terrain unexplored previously by the trade unions on account of the lack of representation. This is even more important if we consider an essential obligation introduced by the Auroux Laws – the duty to bargain the organisation of work and working time. The laws imposed upon the employer the duty to bargain with the representatives of the personnel (which would be the trade union representative) the organisation of work within the company and the arrangement of working time. If we make a connection to the previous sections of this thesis, it may be argued that this duty is a direct implementation of the principles of lean production within the company, by attempting to engage employees into the life of the company through the facilitation the communication channels with the management board. The concrete extension of this duty will be analysed in the next section but it is important to remark for the time being that the reinforcement of the position of trade unions within the company was combined with a duty to bargain.⁵²⁰ The Auroux Laws had two other significant innovations: firstly, it created a new body – the *comité de groupe*, a works council to be set up in groups of companies; secondly, it introduced a very important provision that laid out boldly the objectives underlying the reform of the employee representative structures; that provision is nowadays art.2323-1CTF, which states that the competence of the works

⁵¹⁹ Pélissier, J., A. Supiot, et al. (2008). Droit du Travail, Dalloz.

⁵²⁰ The literature about the Auroux laws is immense. See Verdier, J.-M. (1983). "La présence syndicale dans l'entreprise et la loi du 28 octobre 1982 relative au développement des institutions représentatives du personnel." Droit Social(1): 37-54, Moreau, M.-A. (2004). National Report France. The Evolving Structure of Collective Bargaining in Europe. S. Sciarra. Florence, European Commission, University of Florence, Mazeaud, A. (2006). Droit du Travail, Montchrestien. Pélissier, J., A. Supiot, et al. (2008). Droit du Travail, Dalloz.

council is to “*ensure a collective expression of the employees, allowing the permanent taking into account of their interests in the management of the company and the economical and financial evolution of the company*”. Although this is essentially a declaration of principle, it has the merit of serving as the founding stone of a new philosophy of social dialogue within companies and as an interpretative canon of more technical provisions.⁵²¹

The principles laid out in the Auroux Laws served as inspiration to latter regulatory reforms. An important reform took place in 1993 and consisted in the possibility of the employer factually uniting the staff-delegates and the works councils: the law of 20 December 1993 stated that in companies under the threshold of 200 employees, the employer could determine that the staff-delegates could constitute the representatives of the employees to the works council; although this was in fact an unilateral act of the employer, the only requirement consisted in a non-binding previous consultation the staff-delegates and the works council. This provision is of an illusory simplicity and must be understood at the light of the principles laid out in the Auroux laws: French law suffered from a diversity of employee representative structures at the level of the firm that was particularly burdensome for small and medium companies, resulting in an absence of representation in those companies.⁵²² The Auroux Laws attempted to reverse this absence by promoting unionisation at the level of the company (by abolishing the thresholds for the setting up of trade union sections and allowing unions to designate a staff-delegate as a shop-steward in the company); the law of 1993 contributed further to this trend by factually uniting the works council and the staff-delegate. Although the staff-delegate and the works council legally remained two distinct entities, the reality is that by allowing the employer to consider the staff-delegate as the representative of the employees to the works council, it in fact united these two

⁵²¹ Pélissier, J., A. Supiot, et al. (2008). Droit du Travail, Dalloz.

⁵²² Jean-Emmanuel Ray observed that the traditional employee representative structures existent in French Law had been conceived having in mind the strongest French sectors at the time – mines and metallurgy. The previous texts dated from 1936, 1945 and 1968, a time in which France was primarily an industrial country. The modifications occurred since the 1970s progressively turned France into a services country, with thousands of small and medium companies. This demanded a reform of the structures for employee representation to meet the new economical reality. See Ray, J.-E. (1994). "Regard sur un lifting législatif nécessaire (articles 24 à 32, relatifs aux institutions représentatives du personnel)." Droit Social(2): 142-146.

representative organs and promoted the setting up of works councils in companies. The employees simply had to elect a staff-delegate and that staff-delegate could automatically be the representative of the employees to the works council. This allowed the employer to discuss the issues concerning the mandatory information and consultation procedures as well as the competences of the staff-delegate in one single meeting, thus simplifying the representative structures at the level of the company, reducing their costs and contributing to social dialogue. Some authors equally praised the positive effects that this union could have upon the employees: although works councils generally enjoyed a good reputation among the employees, the staff-delegates were generally considered to be closer to the employees and to have a better knowledge of the internal activity of the company; the factual unification of the two bodies is also capable of boosting social dialogue at the level of the company by combining the advantages of both.⁵²³

The success of this provision opened the doors to an extremely important reform that took place in between 1995 and 1996 by means of the national agreement on contractual policy of 31 October 1995 and the law of 12th November 1996. The national agreement on contractual policy of 1995 was an extremely important agreement signed at the national level by the social partners that intended to develop social bargaining at all levels of the economy. The underlying intention was to provide the social partners with the necessary tools to assume more responsibility in the determination of the conditions of work at each industry and company concerned and thus promote social dialogue. One of the main innovations introduced by the agreement consisted in an extremely strong push towards social dialogue at the level of the company. The agreement stated that the absence of representatives in the majority of small and medium companies and the absence of social dialogue in French companies was seen as detrimental to the performance of the economy. Therefore the agreement took upon its hands the task of developing an articulated contractual practice at all levels of bargaining, in particular at the level of the company, where it was virtually absent. The collective agreement

⁵²³ Cohen, M. Ibid. "L'application des nouvelles dispositions relatives à la représentation du personnel." 147-153, Prétot, X. (1994). "Le Conseil constitutionnel et la participation des travailleurs." Droit Social(2): 139-141, Ray, J.-E. (1994). "Regard sur un lifting législatif nécessaire (articles 24 à 32, relatifs aux institutions représentatives du personnel)." Droit Social (2): 142-146, Pélissier, J., A. Supiot, et al. (2008). Droit du Travail, Dalloz.

then took two extremely innovative solutions: firstly, it expressly allowed the derogation of some provisions of an extended industry level agreement concluded by a representative trade union by a company-level agreement. This was an extremely innovative implementation of the contractualisation of social policy at the level of the company because it partially reversed the *principe de faveur* that was prevalent in French collective bargaining until 1996. The national agreement of 1996 provided that employee representatives at the level of the company could bargain an agreement on the reduction of working time subject to three conditions: (a) in principle, the competence to sign the agreement belonged to the shop-stewards; (b) in the event that there were no shop-stewards in the company, the agreement could be concluded by an employee expressly mandated by a representative trade union for that purpose; (c) in the event that no express mandate existed, the derogatory agreement could be concluded by a staff-delegate; the only requirements were that the derogatory agreement be validated by a paritary industry commission in order to gain efficacy. This model was so innovative for French law that it even motivated a decision from the French Constitutional Court in 1995, who considered that the model was in accordance with the French constitution because the trade unions did not have an absolute monopoly of employee representation; alternative agents could be allowed as long as the natural tendency of the trade unions to defend the interests of the employees in collective bargaining was respected. As we can see, this is a model that comes in the line of the reinforcement of the powers of the actors at the level of the company undertaken by the Auroux laws in 1982 that respects a balance between the decentralisation of bargaining (by providing elected employee representatives with derogatory powers) with the respect of the autonomy and power of the trade unions (the trade unions can control the derogation by means of the mandate and the evaluation by the paritary commission). This system was turned into a law by the Rouen laws of 1996.⁵²⁴

⁵²⁴ Coin, G. (1996). "L'accord interprofessionnel du 31 octobre 1995 sur la politique contractuelle." *Droit Social*(1): 3-11, Julliot, S. (2005). Les turbulences au sein du double canal de représentation en France. *Recomposition des systèmes de représentation des salariés en Europe*. S. Laulom, Publications de l'Université de Saint-Étienne. Cohen, M. (1996). "La réduction "négociée" des avantages des salariés." *Droit Social*(1): 18-20, Morin, M.-L. (1996). "L'articulation des niveaux de négociation dans l'accord interprofessionnel sur la politique contractuelle." *Droit Social*: 11-18.

The saga continued with the Aubry, Fillon and Bertrand laws. The Aubry laws of 1998 and 2000 consisted in a regulatory package that reduced working time in France to 35 hours per week. The laws determined that working time should be reduced to an average of 35 hours per week by means of an agreement with an employee representative. The novelty brought about by the law consisted in allowing companies with less than 50 employees not covered by an extended collective agreement to bargain the reduction of working time directly with a staff-delegate (in the event that there was no shop-steward or mandated staff-delegate in the company) but subject to two additional requirements: (a) the agreement had to be approved by a referendum of the employees and (b) it also had to be approved by a paritary industry commission. The Aubry laws had the merit of reintroducing the system of referendum into French labour law thus providing the agreements concluded by the employee representatives with a greater degree of legitimacy and further engaging employees into the life of companies by means of a direct participation in decision-making questions concerning the organisation of working time.⁵²⁵

The Fillon and Bertrand laws gave a further contribution to this scheme by reversing the hierarchy of norms. The Fillon and Bertrand laws consist in an implementation of the common position adopted by the major French employers association MEDEF and four unions that required public authorities to adopt measures to reverse the *principe de faveur* that governed the relationship between the various levels of bargaining; the demand was for a more decentralised culture of bargaining in accordance to which the lower level agreements could deviate detrimentally from the higher level agreements in order to adapt the working conditions to the situation of concrete companies (in particular in times of crisis). Until the Fillon Laws, collective agreements were subject to the *principe de faveur*, in accordance to which higher level agreements prevailed over lower level agreements. The previous lines of this text illustrated the progressive erosion of this principle in the subjects of

⁵²⁵ For an excellent review of the Aubry Laws see: Borenfreund, G. (2004). "La négociation collective dans les entreprises dépourvues de délégués syndicaux." *Droit Social*(6): 606-620, Souriac, M.-A. (2004). "L'articulation des niveaux de négociation." *Droit Social*(6): 579-590, Julliot, S. (2005). *Les turbulences au sein du double canal de représentation en France. Recomposition des systèmes de représentation des salariés en Europe*. S. Laulom, Publications de l'Université de Saint-Étienne.

working time and wages by the Auroux, Rouen and Aubry laws because they provided for the possibility of derogation under certain conditions. The Fillon laws opened the possibilities of derogation by providing the social partners with full flexibility in the determination of the subjects that could be derogated by lower level agreements; the only exceptions were the law (there are still imperative norms in the law that may not be derogated by collective agreements) and the collective agreement itself, which could determine the situations in which it did not allow deviations from the lower level.⁵²⁶ This means that, in practice, sector-agreements became subsidiary and the centre of gravity of bargaining turned to the company level. The determination of the order public social (the limits to the derogation) lay within the freedom of the parties to the agreement. The Fillon Laws also introduced considerable modifications to the agents competent to conclude the derogatory agreements: the Auroux, Rouen and Aubry laws established a system of preference in relation to employees having a connection to a trade union (shop-stewards and staff-delegates holding a union mandate). The Fillon laws changed this scheme and established a system of preference in relation to elected representatives; in the event that no shop-steward was present in the company, the agreement could be signed by a staff-delegate (independently of any connections to the union) or, in the absence of a staff-delegate, by a mandated employee. This possibility is subject to several requirements however: firstly, this possibility must be provided for in an industry level collective agreement; secondly, the agreement is subject to a referendum and validation by a paritary commission. This means that collective agreements still determined the conditions under which the derogatory agreement could be concluded (which provides trade unions with a certain degree of control over the derogation occurring at the level of the company) and that the focus is placed on an elected representation. In the event that a mandated employee concluded the derogatory agreement, it was subject to a further requirement – an approval in a referendum by the employees of the company. The Bertrand laws of 20th of August 2008 (which will only be enforced from the 20th January 2009 onwards) provided the final push (for the time being) to this movement of decentralisation. The Bertrand

⁵²⁶ The situation reversed from one of positive catalogue (the collective agreement and the law stated the cases in which a deviation was possible) to one of negative catalogue (the collective agreement states the cases in which it does not allow any deviation).

laws brought about a number of important modifications to the rules of bargaining of collective agreements in situations of the absence of a shop steward in the company. Firstly, the requirement of the provision of that possibility in an extended collective agreement was abolished; the derogatory bargaining became possible not by force of the collective agreement but by force of the law; secondly, the possibility of bargaining is not only extended to the collective agreement but also to the law (where it allows derogation by a collective agreement). The following sections (concerning the new types of derogatory agreements) will analyse each one of these agreements in detail. It is sufficient to retain that the law admitted the conclusion of these derogatory agreements to a very large extent by (1) shop-stewards and, in the absence of shop-stewards, (2) staff-delegates and subject to the approval in a paritary commission or (3) specially elected representatives expressly mandated by the trade unions and subject to the approval by a referendum.⁵²⁷ This provides employees with a great margin of manoeuvre in the collective bargaining and clearly transfers the focus of bargaining towards the level of the company.⁵²⁸

This synthetic elaboration of the evolution of the French system of collective bargaining since the beginnings of the 1980s allows us to conclude that there seems to be a clear trend towards the decentralisation of collective bargaining in France. The trend seems to consist in the recognition of an increased relevance to the elective employee representatives at the level of the company (the staff-delegates) and the reservation of power to the trade unions to control the decentralisation by means of several mechanisms (such as the requirement of a permission in a collective agreement to deviate, the need for an approval in an industry paritary commission and the system of the trade union mandate). Although this trend is essentially coupled with derogatory agreements, it is by no means limited to these agreements; the following sections will analyse the new types of agreements that these empowered

⁵²⁷ Pélissier, J., A. Supiot, et al. (2008). Droit du Travail, Dalloz.

⁵²⁸ Borenfreund, G. (2004). "La négociation collective dans les entreprises dépourvues de délégués syndicaux." Droit Social(6): 606-620, Julliot, S. (2005). Les turbulences au sein du double canal de représentation en France. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne, Mouret, J. (2007). Collective Relations in France: a multi-layered system in mutation. Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives. R. Blainpain, Kluwer: 41-65.

employee representatives have been signing with the employers. For the time being it is sufficient to recognise the staff-delegate (*délégué du personnel*) is increasingly becoming an extremely important actor in French collective labour law.⁵²⁹

(c) UK – the UK is, at the eyes of a Continental lawyer, a fascinating system of industrial relations not only because the assumptions under which the continental system of industrial relations (in its various implementations) are reversed but also because it was one that exhibited a most remarkable evolution that brought it closer to the Continental model. The UK system was the one in which the impact of EU law was more evident and profound and consists in an interesting case-study to observe the model underpinning the EU system of employee representation and the potential transformations that Sylvaine Laulom's "*rights based approach*" can bring to a system.⁵³⁰ The following lines will attempt to demonstrate the profound modifications that the British system has been undergoing in terms of the actors; the agreements will be left to the following section.

The British system of industrial relations was traditionally underpinned in three fundamental characteristics: monism, voluntarism and decentralisation. *Monism* means that the representation of employees was made exclusively by trade unions; UK law did not recognise any type of works council type bodies or alternative representation mechanisms in relation to the trade unions. *Voluntarism* means that collective bargaining was made at a purely unconstrained basis; there was no obligation to bargain, the employer discretionally chose to engage into negotiations with a trade union by means of

⁵²⁹ For an interesting evaluation of the impact of the reform and the main difficulties that the new regulations have raised see Borenfreund, G. (2009). "La renouveau du droit syndical dans l'entreprise: entre faveur et défiance?" *Droit Social*(6): 700-710, Cesaro, J.-F. (2009). "La négociation dans les entreprises porvoues de délégués syndicaux." *Droit Social*(6): 658-668, Favennec-Héry, F. (2009). "La représentativité syndicale." *Droit Social*(6): 630-640, Gauriau, B. (2009). "Les représentants des syndicats dans l'entreprise." *Droit Social*(6): 641-647, Mazeaud, A. (2009). "La négociation des accords d'entreprise en l'absence de délégué syndical." *Droit Social*(6): 669-678, Olivier, J.-M. (2009). "Rapport de synthèse." *Droit Social*(6): 687-698, Teyssié, B. (2009). "A propos de la rénovation de la démocratie sociale." *Droit Social*(6): 627-629, Verkindt, P.-Y. (2009). "Les elections professionnelles dans l'entreprise." *Droit Social* (6): 648-657.

⁵³⁰ Laulom, S. (2005). *Le cadre communautaire de la représentation des travailleurs dans l'entreprise. Recomposition des systèmes de représentation des salariès en Europe*. S. Laulom, Publications de l'Université de Saint-Étienne.

a free-willed act of recognition and collective agreements were merely gentlemen's agreements deprived of all binding nature; they did not create legal obligations whatsoever for any party. Finally, unlike what occurred in Continental Europe, most collective bargaining took place at a *decentralised level* at the level of the undertaking. Industry level agreements were rare and limited to a few industries.⁵³¹ This system suffered a fatal blow in the 1990s by means of two extremely important rulings in the cases *Commission vs UK*.⁵³² The cases concern the compatibility of the British system of voluntarism with the Directives on Collective Redundancies and the Transfer of Undertaking (the reactive directives). As it was referred above, these Directives lay out a rigid mandatory information and consultation procedure with the employee representatives whenever one of those situations occurs. The British lawmaker had attributed those competences to the trade unions (in accordance with its monistic system), who could be unable to bargain collective redundancies if the employer failed to recognise them (in accordance with the principle of voluntarism). The ECJ was quite clear when it stated in §19 of case C-383/92 that the Directive does not simply make a reference to the rules in force in the member states concerning the designation of employee representatives; it simply left to the member states a margin of manoeuvre to determine the arrangements for the designation of worker representatives who may or must intervene in the collective redundancy procedures. This meant that EC Law demands a mandatory employee representation at the level of the undertaking for the purposes of the Directives and that the reference to the laws and practices of the member states did not mean that those traditions could compromise the requirements of the Directives but rather that they had to be modified to accommodate the demands of the Directives. This does not mean however that the Directives will harmonise to the fullest extent the systems of employee representation in the Europe; member states retain the discretion to determine the models of employee representation, which simply have to abide by the minimum requirements laid out in those Directives. The principle of voluntarism prevalent in British law was ruled to be contrary to the demands of

⁵³¹ Deakin, S., William S. Morris (2005). *Labour Law*. Oxford, Hart Publisher, Barnard, C. (2007). *Worker Representation in the UK. Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives* R. Blainpain, Kluwer: 83-103.

⁵³² *Commission vs UK* (C-382/93) and *Commission vs UK* (C-383/92).

the Reactive Directives because it left to the discretion of the employer the possibility of negotiating the procedure with the employee representatives. Two other cases also provided a significant impulse to unionism in the UK. The cases became known as *Wilson and Palmer* and deal with the UK's conviction in the European Court of Human Rights for failing to recognise the freedom of association.⁵³³ The cases concerned the narrow interpretation undertaken by the British House of Lords of the employee's right not to have to suffer action short of dismissal taken against them for the purposes of preventing or deterring them from being members or taking part of the activities of a trade union. In these two cases the employers had de-recognised the union and wanted to move workers away from the unionised terms into individual contracts; for that purpose they offered certain inducements (namely pay rises) for workers who abandoned collective representation. The House of Lords decided that this action was lawful for two reasons: firstly, the action of the employer was not a proper action but rather an omission to offer the same benefits to unionised employees; secondly, collective bargaining was not regarded as an essential service of a union. These decisions led to a conviction of the UK in the European Court of Human Rights for violation of art.11 of the European Convention on Human Rights, which protects the freedom of association. This initiated a major change in British Law that created a somewhat hybrid dualist system of employee representation and greatly reinforced the powers of the actors at the level of the company.⁵³⁴

The most important modification brought about by the ruling that is expected to provide a great push to company level social dialogue consisted in the introduction of the statutory procedure for recognition. This procedure was introduced by the Employment Relations Act of 1999 (subsequently modified in 2004) and has a very clear purpose: in the event that an employer refused to recognise a trade union for the purposes of collective bargaining, the procedure

⁵³³ *Associated Newspapers vs Wilson; Associated British Ports vs Palmer* (1995) ICR 496 HL.

⁵³⁴ Davies, P. L. (1994). "A challenge to the single channel." *Industrial Law Journal* **23**: 272 ff, Davies, P. and M. Freedland (2004). National Report United Kingdom. *The evolving structure of collective bargaining in Europe 2004*. S. Sciarra, European Commission, University of Florence, Barnard, C. (2007). Worker Representation in the UK. *Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives* R. Blainpain, Kluwer: 83-103, Davies, P. L. and M. Freedland (2007). *Towards a Flexible Labour Market: labour legislation and regulation since the 1990s*, Oxford. Deakin, S., William S. Morris (2005). *Labour Law*. Oxford, Hart Publisher.

allowed the union to initiate seek a mandatory recognition from a public authority that will oblige the employer to engage into a collective bargaining procedure with it. The 1999 Act was not the first attempt to introduce a statutory procedure for recognition in the UK. The previous attempts dated to the Industrial Relations Act 1971 (with its short-lived National Industrial Relations Court) and, in particular, to the Employment Protection Act 1975. It is worth reviewing these acts and the reasons for their failure in order to understand the Employment Relations Act 1999. The Industrial Relations Act 1971 allowed trade unions to apply to the National Industrial Relations Court for recognition as a sole bargaining agent in respect of a bargaining unit. The scheme was simple: if it was evident that there was a bargaining unit in which the majority of employees supported the union, the union would be recognised; if it were not so, the application would be referred to the Commission on Industrial Relations, which would organise a ballot in the workplace. The TUC organised campaigns for non-registration because the act also limited to a considerable extent the possibility of the use of strike in collective bargaining. This led the Act to be repealed in 1974. The Employment Protection Act 1975 attempted to revive the procedure by determining that statutory claims for recognition were to be handled by the ACAS (Advisory, Conciliation and Arbitration Service), which consisted in a tripartite body destined to handle recognition claims. The ACAS failed to fulfil its mission to provide for a Social Contract on account of a number of factors: the members of the tripartite body were unable to agree on key issues such as the level of employee support needed for recognition or the appropriateness of the claimed bargaining unit. There was considerable scope for inter-union competition (both between TUC affiliates and between TUC and non-TUC organisations) and disruptive litigation and refusal to deal by union-resistant employers and competing unions. These difficulties led to lengthy delays in the processing of union recognition claims, during which their levels of membership and support proved difficult to maintain. The enforcement procedure of the 1975 Act proved ineffective in inducing hostile employers to bargain once a recognition procedure had been made because it depended of a union's recourse to arbitration on a claim for improved conditions of employment. The Act was repealed in 1980 (under the regulatory package of the anti-union Thatcher policy) and its impact is difficult to estimate: although the figures claim that it had a marginal impact on the workforce many claim that

it had an indirect effect of encouraging voluntary union recognition by employers in order to avoid the procedure.⁵³⁵

The statutory procedure for recognition was later reintroduced in the Employment Relations Act 1999 that was enacted in the fulfilment of the Labour Government Policies of Fairness at Work proclaimed in 1998. The background of this act is striking: a document issued by TUC in 1995 proposed rights for representation at work on account of the “*growing job insecurity, excessive rewards for top executives and harsher management demands*”; if we take into account that this appeal occurred in the sequence of the monetarist and strongly shareholder-value policies that had been implemented since the 1980s in the UK, it is interesting to observe that employee representation was seen as the most appropriate answer to tackle the agency problems that the excessive pressure that shareholders placed upon managers caused vis-à-vis employees; this is precisely what the Corporate Governance literature names as a class conflict (occurring between managers and shareholders vis-à-vis employees).⁵³⁶ This idea of representation as a means of reducing agency costs of employees vis-à-vis managers was evident in the Fairness at Work document referred above when it stated that representation is preferable to the absence of representation. There was a modification introduced to the character of representation however as (1) voluntary arrangements for representation should have priority and that (2) union representation should be mandatory only if the majority of the employees wanted it. These two elements explain the reasoning underpinning the statutory procedure for recognition – representation should be promoted and it should enjoy the support of the employees of the undertaking.

⁵³⁵ The figures claim that about 65.000 employees were covered by voluntary agreements arising from the statutory recognition procedure, of which only 16.000 were the result of ACAS declarations; the remaining consisted in a voluntary recognition set out in earlier terms of the procedure. See Collins, H., K. D. Ewing, et al. (2005). Labour Law: texts and materials, Oxford, Deakin, S., William S. Morris (2005). Labour Law, Oxford, Hart Publisher. Hall, M. (1996). "Beyond recognition: employee representation and EU Law." Industrial Law Journal 25(1): 15-27, Hall, M. (1999). Trade Union Recognition and the Employment Relations Bill, EIRO.

⁵³⁶ Gospel, H. and A. Pendleton, Eds. (2005). Corporate Governance and Labour Management - an international comparison, Oxford, Jackson, G., M. Höpner, et al. (2005). Corporate Governance and Employees in Germany: changing linkages, complementarities and tensions. Corporate Governance and Labour Management: an international comparison. H. Gospel and A. Pendleton, Oxford.

The procedure itself is complex and consists of several stages: the procedure is initiated by a union's written request to an employer in respect of a certain group of employees (a bargaining unit). The union must possess a certificate of independence and the employer must have a minimum average threshold of 21 employees in the 13 weeks preceding the request.⁵³⁷ The employer's response to that request is decisive: in the event that the employer and the union agree upon the bargaining unit within 10 days or demonstrates a willingness to negotiate and the parties reach an agreement within 20 days then the union will be considered as recognised in relation to that bargaining unit and no further steps are taken. This agreement has a significant quality: it is considered valid for a minimum period of three years, unless the parties agree otherwise. This means that the employer cannot in principle derecognise the union for minimum periods of three years and terminate the social dialogue with the union. In the event that the employer fails to recognise the union or no agreement is reached, then the union may apply to the CAC. The CAC will then determine (1) whether the bargaining unit is appropriate and (2) whether the union enjoys a majority support among the employees of the proposed bargaining unit. There are four substantive grounds under which the application will be deemed not receivable: (a) if there is already in force a collective agreement under which a union is recognised in respect of any of the workers falling within the bargaining unit; this is valid only if the recognition covers the main topics of collective bargaining under which statutory recognition may be afforded (pay, hours, holidays); (b) if the applicant union does not present evidence that it has a minimum threshold of 10% of affiliates in the bargaining unit and simultaneously enjoys the support of the majority of the workers of the unit; (c) if two or more unions make the application unless they prove that they will cooperate and maintain stable bargaining arrangements; this means that there must be single-table bargaining either in respect of one single union or more cooperating unions; (d) if the CAC already accepted an application in relation to the same bargaining unit in the former three years. These four grounds of rejection of the application provides us with a clear evidence of the

⁵³⁷ There is no requirement that the employees must have worked for a minimum period with the employer in order to qualify for inclusion in the threshold and the concept of "associated employers" prevents the employer from dividing its business into several units in order to circumvent the thresholds. See Collins, H., K. D. Ewing, et al. (2005). Labour Law: texts and materials, Oxford, Deakin, S., William S. Morris (2005). Labour Law. Oxford, Hart Publisher.

principles enunciated above. The fact that the application is liminally rejected in the event that the employer already recognised a union in relation to the same bargaining unit provides us with clear evidence that priority is effectively given to voluntary arrangements. In this sense the tradition of voluntarism in British collective bargaining is not affected as the voluntary recognition of a union bars the statutory recognition procedure. The appropriateness of this solution has raised some doubts in the British legal thinking because there is no mechanism to impede an employer's choice of a minority union, which will in reality weaken employee representation.⁵³⁸ Secondly, it is also interesting to observe that the application is rejected if the union does not prove simultaneously majority support among the employees of the bargaining unit and a 10% threshold of affiliates. This means that there must be an intimate connection between the employees in the workplace and the applicant union. The same system is prevalent in France where the legislator has attempted to combine elected and union representation in the same person in order to allow derogatory agreements in the workplace, which is seen to provide greater legitimacy. Finally, the requirement of a single-table bargaining ensures a majority support of the trade union(s) among the employees and reinforces their legitimacy by avoiding trade union fragmentation or frivolous applications by unions that do not enjoy sufficient representation among the workforce.

The determination of the appropriateness of the proposed bargaining unit deserves a special reference. The bargaining unit is seen as appropriate when there is a need to be compatible with effective management. This means that only units that engage into direct dialogue with the management in accordance with their characteristics are deemed worthy of representation by a trade union. This is particularly interesting if we compare with the German example of the *Sparten* or the *Arbeitsgruppen*, in which the bargaining powers of the works council were transferred to those units on account of their specificity in the company and their need to engage in a particular dialogue with the management. Here too we may observe an implementation of the principles of lean production in work; considering that the determining characteristics of

⁵³⁸ Virtually all the authors are unanimous in the inconvenience of this solution. See Davies, P. L. and C. Kilpatrick (2005). *La représentation des travailleurs au Royaume-Uni après le canal unique. Recomposition des systèmes de représentation des salariés en Europe*. S. Laulom, Publications de L'Université de Saint-Étienne, Deakin, S., William S. Morris (2005). *Labour Law*. Oxford, Hart Publisher.

lean production consisted in the decentralisation and projectification of work in strategic bargaining units, the identification of the appropriateness of the bargaining unit to engage in matters of collective bargaining is sufficient to observe an introduction of this philosophy of organisation of work within companies.

The final part is the procedure for recognition itself: if the CAC is convinced on the basis of the evidence presented by the union that the union enjoys a majority support in the bargaining unit (by means of a minimum 10% threshold of affiliates and a majority support) then it will declare the union as recognised; if not, then it must hold a secret ballot that is valid only if a minimum of 40% of the employees of the unit exercise the right to vote. The CAC is happy with a simple majority as long as the minimum threshold for participation is respected. This ensures the legitimacy of the trade union to conduct bargaining in the name of the employees concerned.

In the event that the CAC declares the union as recognised, several consequences follow. The foremost consequence consists in the provision to the parties of a 30 day period for them to agree on the method by which they will conduct bargaining; if no agreement is reached, the CAC will then act as a conciliator to encourage them to reach an agreement; finally, if the conciliation is unsuccessful, the CAC will issue a method that will function as a binding contract between the parties. This is of extreme relevance and deserves further explanation: the declaration of recognition does not impose a rigid bargaining procedure, it leaves to the parties the freedom to bargain the most appropriate arrangement; this emphasis on conventional freedom is so extensive that the subsidiary procedure to be issued by the CAC – if the conciliation fails - is not more than a private law contract that may be reversed at any time by the parties to the contract. This subsidiary procedure provides for a works council type of body – a Joint Negotiating Body – that is composed by union members. Secondly, the recognition is afforded only for certain subjects – pay, hours and holidays. Although the parties are free to discuss any other matters, they are not obliged to do so because the unions are recognised only for those matters in relation to a particular appropriate bargaining unit where they enjoy the majority support. Thirdly, the obligation to discuss does not mean an obligation to reach (or attempt to reach) an agreement. It is merely a duty of means and not a duty of result. Finally, the statutory recognition has the effect that the

employer cannot derecognise the union for a period of three years. The parties are free to agree on a longer or lesser period but the statutory period is three years. This means that the employer is obliged to discuss issues concerning pay, hours and holidays in relation to the employees of a particular bargaining unit where the union unequivocally enjoys majority support by a minimum period of three years.⁵³⁹

As overall evaluation of the statutory procedure for recognition seems difficult. One can praise the statutory procedure for betting upon three distinct dimensions: (1) the fact that it factually created incentives for employers to engage in collective bargaining because the outcome of the procedure consists in a duty to bargain for three years subjects of pay, hours and holidays; (2) the fact that it placed a great emphasis on reaching voluntary arrangements between trade unions and employers and avoiding explicit statutory procedures, which are not only an exception in the traditional British system of industrial relations but also in contrast to the approach followed by the EU in betting in ad hoc information and consultation procedures in order to ensure employee engagement by means of the proactive directives; (3) it discouraged frivolous applications by demanding that the union enjoyed a majority support (both in terms of affiliations and support of non-affiliated employees) thus approaching the interests of the union and those of the bargaining unit (which must have some kind of autonomy to bargain with the employers) and creating incentives for a bargaining closer to the concrete needs of the company and of the bargaining unit. These are the reasons why the opinions in relation to the statutory procedure are generally favourable because it created a climate more favourable to collective bargaining and stimulated unions to put more resources into organisation and employers to have more attention to union claims. The greatest success of the procedure did not consist in the outcome of the procedures but in the general trend of voluntary recognition of unions that is

⁵³⁹ For an excellent analysis of this procedure, see Deakin, S., William S. Morris (2005). Labour Law. Oxford, Hart Publisher. For more critical perspectives see Davies, P. and M. Freedland (2004). National Report United Kingdom. The evolving structure of collective bargaining in Europe 2004. S. Sciarra, European Commission, University of Florence, Davies, P. L. and C. Kilpatrick (2005). La représentation des travailleurs au Royaume-Uni après le canal unique. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de L'Université de Saint-Étienne.

currently spreading to avoid the statutory procedure.⁵⁴⁰ The procedure is not absent from criticisms however. The major criticisms that are generally pointed out consist in the possibility of the employer recognising a minority union in the bargaining unit in order to block a statutory recognition procedure. This would demand the existence of criteria of representativity similar to the ones enforced in France that the UK lawmaker has been unwilling to implement. On the other hand, the absence of the duty to attempt to reach an agreement and the limitation of the recognition to three subject-matters seems to open the way for the employer to recognise the union merely to avoid further procedures and then pay lip-service to the employees in order to avoid industrial action. This does not create incentives for concrete company-level bargaining. Nevertheless the simple existence of a mandatory representative of the employees that must be recognised by the employer in relation to the subjects of pay, hours and holidays (that affect the employees to the first extent) is already a considerable victory and a great impulse for bargaining at the level of the company.

Another significant innovation consisted in the introduction into the UK system of industrial relations of elected employee representative structures in the workplace that appear to be works council type bodies. The traditional monist structure of employee representation that existed in the UK meant that there were traditionally no directly elected employee representative bodies. The situation modified considerably in the last few years as a direct consequence of EC Law. The inadequacy of the traditional monist system of employee representation to the modifications occurring in companies and in the competitive environment in which they were active had been previously noticed and there were previous attempts to introduce directly elected employee representative in the UK. In a book dated from 1973, McCarthy and Ellis criticised the attempt to establish a statutory procedure for trade union recognition by the Industrial Relations Act 1971 and stressed the need for a direct employee representation in-company; the purpose was to open room for these bodies to engage into dialogue with the management force and render

⁵⁴⁰ Davies, P. L. and C. Kilpatrick (2005). La représentation des travailleurs au Royaume-Uni après le canal unique. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de L'Université de Saint-Étienne. Davies, P. L. and M. Freedland (2007). Towards a Flexible Labour Market: labour legislation and regulation since the 1990s, Oxford.

companies more adaptable to the volatile circumstances of the time.⁵⁴¹ The failure of the Industrial Relations Act 1971 and of the Employment Protection Act 1975 and the subsequent anti-union Thatcher policy that dominated the 1980s postponed the wish to have more employee representation. The conviction of the UK in the two rulings *Commission vs UK* and the election of the Labour Government in 1997 opened the way for the introduction of more employee representation in-company. Curiously, this also opened the way for the introduction of a body unknown to British Industrial Relations, which were directly elected employee representatives.

The first reference to directly elected employee representatives came in the form of workforce agreements in the UK. These are agreements (to be analysed below) that provide for the possibility of the employer deviating from the statutory requirements in certain subjects and within certain limits by means of an agreement with the workforce. When the employer does not recognise a trade union in relation to a certain bargaining unit and wishes to deviate from the provisions laid down in the law, he may do so by means of a workforce agreement. This workforce agreement consists in an agreement between an employer and its workers or their representatives that deviate from the standards laid down in the law. In order for this agreement to be signed, no union must be recognised in relation to the bargaining unit in question and the terms of the contract of employment of the workers affected must not be regulated by an incorporated collective agreement. In these situations (in which unions are completely absent from the process) the employer may bargain the agreement with directly elected employee representatives. These representatives consist in employees that are elected by means of a secret ballot by the employees of the undertaking and that have the task of bargaining the adaptation agreement with the employer. In the event that the company has less than 20 employees, there is no need to conduct an election and the agreement may be approved by means of proposal addressed directly to the employees and approved by the majority of them. These workforce agreements will be analysed in more detail in the next section; for the time being it is sufficient to acknowledge that the employer may bargain directly with the

⁵⁴¹ The book is extremely interesting as it seems to have anticipated the developments that would occur in the 1990s. See McCarthy, W. E. J. and N. D. Ellis (1973). Management by agreement - an alternative to the Industrial Relations Act Hutchinson of London.

elected employee representatives an agreement covering the entire workforce in deviation or adaptation of the legal standards as long as no trade union is recognised in relation to that bargaining unit, no collective agreements have been incorporated into employment contracts and the requirements for an appropriate representation of the employees have been fulfilled.⁵⁴²

The statutes equally make reference to elected employee representatives in information and consultation procedures. This is where the influence of EU Law was most visible because the majority of the information and consultation procedures statutorily provided for in British Law result directly from the transposition of Labour Law Directives. The relevant Directives here are the Collective Redundancies, Transfer of Undertakings and the Information and Consultation Directive. This paragraph will deal with the first two Directives because the latter Directive has some specificities that deserve a paragraph of its own. As it was mentioned above, the Collective Redundancies and the Transfer of Undertakings Directives (the reactive directives) set out a rigid information and consultation procedure that demands mandatory employee representation. The UK reacted in 1999 to its conviction in the ruling *Commission vs UK* by introducing some amendments to the TULRA that modified the traditional scheme of the appropriate representatives and introduced elected representatives. Currently, in the event that an employer is contemplating a collective redundancy or a transfer of an undertaking he must consult previously the appropriate representatives. These representatives obey the following hierarchical scheme: if the workers being made redundant or transferred belong to a bargaining unit in respect of which one or more trade unions are recognised, the employer must mandatorily consult those unions, even if the union members consulted are not going to be affected by the proposed measure; if no union is recognised in relation to that bargaining unit, the employer is obliged to consult specifically elected representatives; this also happens when the employees being made redundant belong to a bargaining unit in respect to which no union is recognised; the employer is obliged to engage in a single-table bargaining with union and specifically elected

⁵⁴² Davies, P. L. and C. Kilpatrick (2005). La représentation des travailleurs au Royaume-Uni après le canal unique. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de L'Université de Saint-Étienne, Deakin, S., William S. Morris (2005). Labour Law. Oxford, Hart Publisher.

representatives; these representatives must be employed by the employer at the time of the election therefore excluding that external advisors stand as appropriate representatives; the candidates for the election must be employees affected by the measure and no employee affected by the measure may be excluded from standing for election; in the event that the employees fail to conduct the election, the employer must inform each employee individually but is not obliged to consult each employee individually; both the Directives and the national statute presuppose that all consultation is made by means of representatives and that the employees must at least have the possibility to elect representatives; the absence of a duty to consult each employee individually may be understood as a means of creating incentives for the employees to set up a union or elected representative body.⁵⁴³

The Information and Consultation Directive (which should be analysed individually) is currently the last innovation in British Industrial Relations that provides us with a hint that the British system is currently evolving into a hybrid dualist system closer to Continental patterns. As it was referred above, the Information and Consultation Directive provides for mandatory information, consultation and consultation with a view to reaching an agreement (depending on the subject-matter) with mandatorily recognised employee representatives in the company as long as the company employs at least 50 employees or the undertaking employs at least 20. The transposition of the Directive into British law was made in 2004 with the “*Information and Consultation of Employees Regulations*”. These statutes presented the Government with major issues to resolve in the area of the choice of representatives; this was even more so if we consider that the Directive, whilst laying down the principle of consultation, left member states with a great margin of manoeuvre in relation to the implementation of that agreement. The UK Government was determined from the beginning to avoid a “*one size fits all*” approach to information and consultation rather creating room for a wide variety of practices that could combine several company-specific forms of employee representation. The objective was to attempt to generate a high level of consensus between the

⁵⁴³ Collins, H., K. D. Ewing, et al. (2005). *Labour Law: texts and materials*, Oxford, Deakin, S., William S. Morris (2005). *Labour Law*. Oxford, Hart Publisher, Barnard, C. (2007). *Worker Representation in the UK. Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives* R. Blainpain, Kluwer: 83-103.

employer and the employee representatives while transposing the principle of consultation into British law. This section will be concerned with the choice of representatives because the following section will attempt to analyse the collective agreements reached at the level of the company.

As regards the choice of employee representatives, the UK undertook the revolutionary choice of providing for a strong preference for representatives elected by the whole workforce to the detriment of unions; in this sense, by postponing union priority, it gave a strong blow to the monist system in the UK. The Information and Consultation of Employees Regulations (transposing Directive 2002/14) determined that, in the event that no previous information and consultation agreements were already in force in the company, the employer had to make arrangements for the employees to elect or appoint negotiating representatives either at the initiative of the employer or at the request of a minimum threshold of 10% of the employees (subject to a maximum of 2500). The Information and Consultation of Employees Regulations are extremely sparse in the details of the process, merely stating that each individual employee had the statutory right to participate in it and that, in the default of an agreement, the employer must organise a secret ballot to elect representatives (who must be employees of the undertaking) normally on the ratio of 1 representative for each 25 employees. These regulations produced a complete divorce in relation to the practices of collective bargaining. The recognition of a union and the existence of an agreement providing for collective terms and conditions of employment applicable to the whole workforce of the undertaking will not prevent the existence of a consultation agreement (either bargained or applicable by force of the fallback provisions) operating alongside a collective agreement with directly elected non-union employee representatives. This will be the case even if the collective agreement had been imposed by the CAC as the result of a statutory procedure for recognition; conversely, the existence of a consultation mechanism covering the entire workforce will not prevent a union from applying to the CAC in order to gain recognition in relation to a concrete bargaining unit in matters of pay, hours and holidays (provided that the union enjoyed sufficient support among the employees of the proposed bargaining unit). Therefore, the statutory recognition machinery and the ICE regulations seem to run on parallel tracks; the only potentiality for overlapping between union and non-union forms

of employee representation seems to occur in consultation relating to redundancies and transfers when there is a recognised union; in order to preserve harmony with the TULRA the conflict was resolved by providing priority to the unions upon notification to the standard employee representatives. This exception to the general preference for elected representation is understandable in order to preserve harmony with the competences of recognised unions prescribed in the TULRA and because unions are normally in a better position to bargain these matters because they have a stronger background. The unions may attempt to counterbalance this scheme by putting forward unionised employees for election as representatives or by incorporating into collective agreements the duties to inform, consult and consult with a view to reaching an agreement provided for in the ICE Regulations and Directive 2002/14. The practical effect of the latter hypothesis would be to classify these collective agreements as pre-existing arrangements for information and consultation and therefore prevent the election of employee representatives, guaranteeing their monopoly in collective bargaining.⁵⁴⁴ This is not worrisome as long as the requirements of Directive 2002/14 are respected and the concrete arrangements lead to a progressive engagement between the employer and the recognised union strengthen social dialogue at the level of the company – which is the ultimate objective of Directive 2002/14.⁵⁴⁵

This description of the evolution of the actors in British labour law may allow us to conclude that – in parallel to the other countries - there seems to be a movement of diversification of the powers of the actors at the level of the company and a progressive attempt to introduce more partnerial forms of

⁵⁴⁴ Similarly to what occurs in the EWC Directive, the ICE provides that the procedure to elect employee representatives and bargain an ad hoc information and consultation agreement is applicable only if no pre-existing agreement exists that satisfies the requirements of Directive 2002/14. The incorporation of these duties in collective agreements would qualify them as pre-existing agreements and prevent the election of works council type bodies. The following sections will analyse these agreements.

⁵⁴⁵ Ewing, K. D. and G. M. Truter (2005). "The Information and Consultation of Employees Regulations: voluntarism's bitter legacy." *Modern Law Review* 68(4): 629-641, Hall, M. (2006). "A cool response to the ICE regulations? Employer and Trade Union approaches to the new legal framework for information and consultation." *Industrial Relations Journal* 37(5): 456-472, Lorber, P. (2006). "Implementing the Information and Consultation Directive in Great Britain: a new voice at work." *International Journal of Comparative Labour Law and Industrial Relations* 22(2): 231-258, Davies, P. L. and M. Freedland (2007). *Towards a Flexible Labour Market: labour legislation and regulation since the 1990s*, Oxford, Taylor, P., C. Baldry, et al. (2007). *The Information and Consultation of Employees Regulations: an Analysis of their Effectiveness in Relation to Corporate Restructuring and Redundancy*, Amicus.

representation. The assessment is harder to make because – in contrast to continental Europe – the UK never exhibited a dual form of employee representation or sector level bargaining. The reinforcement may be seen in the following elements: the foremost element consisted in the introduction of the statutory procedure for recognition; this procedure – which had precedents in the UK – factually obliges the employer to recognise a union and to bargain with it matters relating to pay, hours and holidays; although this catalogue is small it is nonetheless significant because those are the matters that concern employees most directly and that may serve as the seed to engage in further dialogue. The introduction of the procedure is not without criticisms however: the intention to preserve voluntarism had the consequence of providing prevalence to voluntary recognition; whereas this might have advantageous consequences (because the threat of the statutory recognition might encourage voluntary recognition) it might equally have adverse consequences because there is no mechanism to prevent the employers' choice of a minority union to engage in bargaining; this led several authors to propose the introduction of criteria of representativity (similar to France) in order to ensure proper representation.⁵⁴⁶ In addition to the introduction of the statutory procedure for recognition, the UK equally introduced directly elected forms of employee representation inside the company, which may open the road to the development of works council type bodies. These bodies are – for the time being - merely ad hoc and their relation to the trade unions is not altogether clear. The first reference to these types of bodies came in the form of workforce agreements, which consisted in the possibility to deviate (subject to certain preconditions and limits) from the standards laid down in the law by means of an agreement with specifically elected representatives. The second reference came in the form of elected representatives in situations of transfer of undertakings and collective redundancies, which had the task of representing the employees in the information and consultation procedures. These bodies had one thing in common: they could be set up only in the absence of recognised unions (both voluntarily or statutorily). This last requirement was put aside in the transposition of the Information and Consultation Directive, which

⁵⁴⁶ Davies, P. L. and C. Kilpatrick (2005). La représentation des travailleurs au Royaume-Uni après le canal unique. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de L'Université de Saint-Étienne.

led to several criticisms from the trade unions and legal thinking. The articulation between both levels of bargaining was one point: although this seems to open the road for the setting up of a true dualist system of bargaining in the UK, the articulation of the level with the traditional voluntarist system is still a challenge; another point consists in putting aside trade unions in mechanisms for information and consultation, which is one of the natural tasks of unions in a decentralised system as the one in the UK. One solution lay in putting unionised employees as candidates to the election to these bodies; this is a solution similar to the one encountered in Germany to coordinate the actions of the *Betriebsrat* with the trade unions and in France, where unions have monopoly representation in the works council; another solution lay in incorporating information and consultation procedures in the collective agreements concluded with recognised unions. Whatever the solution may be, the reality is that the combination of these elements (statutory procedure and elected bodies at the level of the workplace) may have a considerable impact in promoting social dialogue at the level of the company even in a traditionally decentralised system such as the one in the UK because social dialogue becomes mandatory and covers a wider range of topics.

(d) Portugal – Portugal has also taken some feeble steps towards the reinforcement of the powers of the actors at the level of the company, although the extension of the reforms do not match the ones found in France or Germany. Portugal is also a country where the influence of EU Law is most visible, in parallel with the UK. The modifications introduced are expected to bring a substantial transformation of the Portuguese system of industrial relations.

The Portuguese system of employee representation may be classified as a dualist system that stands halfway between the German and the French system. The Portuguese system takes from the German system the rigid division of competences between the trade unions and the works councils and the principle of double-affiliation (meaning that collective agreements are binding only upon the affiliates to the trade union); from the French system, Portugal takes an extreme reading of the freedom of association (trade unions may be freely set up and claim participation in collective bargaining,

independently of criteria of representativity),⁵⁴⁷ the absence of any co-determination structures (works councils merely have constitutional rights to information and consultation) and the extensive use of administrative procedures for extension in order to apply collective agreements to non-affiliated employees. The task of employee representation is constitutionally reserved to the works council (*comissão de trabalhadores* – art.54 CRP), which is in principle competent to all the information and consultation procedures occurring within the company.⁵⁴⁸ The feeble implementation of works councils led to the search for alternative means of employee representation that are expected to bring about some modifications to the Portuguese panorama of industrial relations. This section will attempt to describe these new actors.

One of the most important innovations that the Labour Code of 2003 and the reform of 2009 brought about consisted in the transposition of Directive 2002/14. The Information and Consultation Directive could perfectly have been transposed by attributing to the works council the competence to exercise the duties contained in it; the enumeration of the competences of the works council contained in art.54CRP sufficed to transpose the requirements of the Directive. This solution found some practical implementation in the text of the Labour Code because the densification of the constitutional competences of the works council contained in arts.423-429 CTP represents a good transposition of the requirements of Directive 2002/14. This laudable transposition in terms of regulatory technique was destined to become dead letter however on account of the feeble implementation of works councils in the Portuguese industrial relations landscape. The number of works councils is absolutely residual and the Portuguese workers do not have a great tradition of association and participation in the life of companies, mostly due to the strongly personal and proprietary conception of the company prevalent in Portuguese law; the

⁵⁴⁷ Portugal deviates from the French system in this last dimension (absence of criteria of representativity); whereas France recognizes the freedom of association to its fullest extension but reserves collective bargaining to the most representative unions, Portugal does not demand any criteria of representativity to participate in collective bargaining procedures. See Gomes, J. V. (2004). National Report Portugal. The evolving structure of collective bargaining in Europe 1990-2004. S. Sciarra. Florence, European Commission, University of Florence, Lobo Xavier, B. (2004). Curso de Direito do Trabalho, Verbo.

⁵⁴⁸ An extremely interesting article that describes the panorama of Portuguese industrial relations, from both a legal and sociological point of view, can be found in Menezes Leitão, M. J. (2001). "General features of collective bargaining in Portugal " International Journal of Comparative Labour Law and Industrial Relations: 441 ff.

company is regarded as the ownership of the manager whose management is unaccountable to anyone except himself. Having into account these difficulties, the Portuguese lawmaker took the innovative approach of attributing the same competences to the shop-steward. Portuguese Law states that the shop-steward is to be elected by the workers of one company affiliated to one particular trade union (art.462CTP); the shop-stewards must be affiliated to a particular union, it must be elected by the workforce and the trade union must accept to have that particular person as its representative within the company; this means that shop-stewards have a double legitimacy – both elected and designated. The traditional tasks of the shop-stewards were absolutely residual: normally, they were limited to informing the trade union of the situation in the company and to the supervision of the compliance with the law and the collective agreements; they had no bargaining power whatsoever.⁵⁴⁹ Art. 466CTP changed this state of the world and attempted to provide the shop-steward with a new role by stating that the shop-steward is entitled to exercise the information and consultation competences contained in Directive 2002/14 in the same way as the works council. This means that, in practice, the shop-steward will be entitled to exercise the competences of the works council in the performance of the duties contained in Directive 2002/14 (which are already quite extensive). Although art.466(3)CTP considerably limits the reach of this provision by stating that it is applicable only to companies with more than 50 employees (which account for only 3 % of the Portuguese company fauna) it is nonetheless important because it is expected to introduce the tradition of social dialogue in Portuguese largest companies. The feeble implementation of works councils in Portuguese companies was mostly due to a fear from the employer; the trade unions – whose action is mostly limited to the determination of wages and conditions of work at the level of the sector – have long wished to extend their action into the company and attempt to have an influence in company-level social dialogue. The transposition of Directive 2002/14 and the attribution of the role of social dialogue to the shop-stewards provided trade unions with a strong instrument to accomplish that means: employees tend to feel safer when belonging to a trade union and the strong protection afforded by the law to the shop-stewards helped trade unions to feel more courageous and

⁵⁴⁹ Monteiro Fernandes, A. (2004). *Direito do Trabalho*, Almedina.

innovative in attempting to introduce social dialogue at the level of the company. On the other hand, the particularly demanding regime of election of the shop-stewards (who must be affiliated to a trade union, be elected by the employees of the company affiliated to a trade union and be designated by that trade union to stand as its representative in the company) not only provides it with a reinforced legitimacy (because they are both employees of the company and members of the union) but it also approximates the Portuguese industrial relations regime to the French regime, in which in-company representation must have both elected and union representation, most notably by means of the delegation unique, in which one elected employee performs all the roles of the union and staff representation.⁵⁵⁰

Another significant innovation consisted in the introduction of new employee representative bodies. These bodies were thought to address the failure to implement works councils in the Portuguese company life and provide employees with instruments to answer situations of crisis; this was equally where the influence of EC Law was most visible, in a situation comparable to the UK. There are numerous examples throughout the Labour Code of these new ad hoc bodies: for instance, art.360(3) CTP states that if the employer intends to promote a collective redundancy and the employees are not represented by a works council or a trade union section, they may elect an ad hoc representation composed by the workers affected that is going to bargain the procedure; this is a solution much similar to the one found in the UK in which the workers affected by a redundancy have the possibility of electing a specific representation in the absence of recognition of a trade union. Another innovation consists in the introduction of the idea of referendum in Portuguese law: in accordance with art.206(2)CTP, the employer will be able to define the working time in average terms for a certain economic unit as long as 75% of

⁵⁵⁰ Gomes, J. V. (2004). National Report Portugal. The evolving structure of collective bargaining in Europe 1990-2004. S. Sciarra. Florence, European Commission, University of Florence. Lobo Xavier, B. (2004). Curso de Direito do Trabalho, Verbo.

the workforce of the economical unit affected agree to it.⁵⁵¹ This solution reminds us of the organisation of specific employee representative structures in companies that are divided in independent units (*Sparten*) as referred above in the analysis of German law.

These two examples reveal that Portuguese law is timidly attempting to overcome the absence of employee representation within companies and promote more participative schemes and company-level social dialogue. Considering the failure to implement works councils, the legislator attempted to introduce alternative solutions. The most relevant solution consisted in the attribution to the shop-steward of the competence to perform the information and consultation duties contained in the transposition of Directive 2002/14. Considering the potentially far-reaching scope of this Directive, the provision might have a considerable impact because the protection afforded by the trade unions and the demanding requirements of legitimacy (both elected and designated) to become a shop steward provide the shop-steward with a new role within companies capable of representing employees both as a class (on account of the union affiliation) and as stakeholders of the company (on account of being employees of the company and elected by their colleagues affiliated to the same union). The Portuguese legislator also attempted to overcome the absence of representation by introducing new bodies into Portuguese law; these bodies are directly elected or concern direct participation of the employees and they are designed to overcome the absence of representation in particular situations, such as collective redundancies and the bargaining of the working time. This solution is clearly reminiscent of the British approach of providing for directly elected bodies in specific situations to overcome the absence of recognised trade unions. Although the impact of these measures is still to be evaluated, it nonetheless reveals an effort to

⁵⁵¹ The term "economic unit" (*unidade económica*) must be understood at the light of the case law of the ECJ in the subject of transfer of undertakings. The Portuguese legislator adopted in full the concept of an undertaking as defined in the case law of the ECJ and expanded it far beyond the subject of the transfer of undertakings. The most relevant thing for the application of the provision is the existence of an *independent organized unit* capable of being qualified as an undertaking by the ECJ. For the concept of undertaking and its implementation into Portuguese law see Gomes, J. V. (2007). *Direito do Trabalho - relações individuais*. Porto, Coimbra. Gomes, J. (2001). A jurisprudência recente do TJCE em matéria de transmissão de empresa, estabelecimento ou parte de estabelecimento: inflexão ou continuidade? *Estudos do Instituto de Direito do Trabalho*. Lisboa, Almedina, Gomes, J. (2005). "Comentário de urgência ao acórdão do TJCE de 20.11.2003, proc. nº. C-340/01." *Revista de Direito e Estudos Sociais*: 213-219.

decentralise industrial relations and introduce social dialogue at the level of the company.

5.2.2.1 Comparative perspectives

This short description of the evolutions registered at the level of the actors in each jurisdiction under study may allow us to sustain the conclusion that they are currently suffering a process of evolution that seems to be providing an increasing relevance to the powers of the actors at the level of the company. The modifications are not identical in each jurisdiction because each country exhibited a distinct pattern of employee representation, although they seem to be converging in the same direction. The most appropriate analysis appears to be a functional analysis that would allow us to understand the extent to which each distinct system is providing more and more relevance to the company-level actors.⁵⁵² This leads us to question the place of unions in this movement of decentralisation: the comparative analysis seems to suggest that the unions are not completely out of the picture in this new trend and that their role should be reserved to the control of the process of decentralisation in order to ensure that these new actors do not fall prey to the predominance of the employers but correspond to a genuine interest of the company: in this sense, one can speak of a phenomenon of controlled decentralisation. The following lines will attempt to illustrate how each country evolved in accordance with this idea.

The case of Germany is paradigmatic of this approach. The co-determination powers of the Betriebsrat and the strict division of tasks between the Betriebsrat and the trade unions (*Gewerkschaften*) underpinned in §77(3) BVG seems to have provided the company-level employee representatives with a maximum power and that there would be no room for decentralisation. The realities proved otherwise: the increasing protests against industry level agreements (*Rahmentarifverträge*), which were deemed to be inflexible and inadequate to the realities of the life of companies (particularly in situations of

⁵⁵² Sylvaine Laullom followed the same approach in her conclusions. See Laullom, S., Ed. (2005). Recomposition des systèmes de représentation des salariés en Europe. Saint-Étienne, Publications de l'Université de Saint-Étienne.

crises) led to the search of alternative solutions.⁵⁵³ The *Viessmann*, *Holzmann* and *Burda* cases illustrated the tensions against industry level agreements and the desperate need for a more decentralised culture of bargaining: in the first two cases, the unions refrained from undertaking any actions against the employers, which provides us with a hint that they recognised the moral legitimacy of the agreements; in the *Burda* case, the courts provided these new agreements with a protective shield from the nullifying force of §77(3)BVG by means of a legal manoeuvre that legitimised these agreements considering that they were concluded individually with each employee (thus avoiding their qualification as a company-agreement) and that §77(3)BVG was applicable only to affiliated employees; since both trade unions and employees are fearful of making public their affiliations, the reality was that the case law in practice legitimised company-level agreements in deviation from industry-level agreements.⁵⁵⁴ The new version of §3BVG introduced in 2001 also provided a great contribution to the development of company-level actors. The practical effect of the modification was (1) to reinforce the representation of the works council when the company was divided in several undertakings and (2) to adapt the structures of representation to the new forms of organisation of work, when the autonomy of the departments of the company (in the implementation of the principles of lean production) justified an autonomous representation of the workforce. The requirement that these new structures of representation be

⁵⁵³ Rieble, V. (1996). "Krise des Flächentarifvertrages?" *Recht der Arbeit* 49(3): 151-158, Gentz, M. (1998). Werden die geltenden Tarifverträge der betrieblichen Praxis gerecht? *Tarifautonomie für ein neues Jahrhundert - festschrift für Günther Schaub zum 65 Geburtstag*. M. Schlachter, R. Ascheid and H.-W. Friedrich. München, 1998: 205-217, Molitor, K. (1998). Ende oder Reform der Flächentarifverträge? *Tarifautonomie für ein neues Jahrhundert - festschrift für Günther Schaub zum 65 Geburtstag*. M. Schlachter, R. Ascheid and H.-W. Friedrich. München, C.H Beck: 487-496, Artus, I. (2001). *Krise des deutschen tarifsystems - die erosion des flächentarifvertrags in Ost und West*, Westdeutscher Verlag, Berthold, N. and O. Stettes (2001). *Der Flächentarifvertrag - von wegbereiter der Wirtschaftswunders zum Verursacher der Beschäftigungsmisere. Ökonomische Analyse des Arbeitsrechts*. C. Ott and D. Schäfer, Mohr Sibeck, Streeck, W. and B. Rehder (2003). *Der Flächentarifvertrag: Krise, Stabilität und Wandel* Max Planck Institute für Gesellschaftsforschung, Wendeling-Schröder, U. (2005). Auf der suche nach einem modernen Tarifvertragsrecht. *Arbeitsrecht im sozialen Dialog - Festschrift für Hellmut Wissmann zum 65 Gerburtstag*. W. Kohte, H.-J. Dörner and R. Anzinger. München, C.H Beck: 174-184.

⁵⁵⁴ Rémy, P. (2004). Une redistribution des competences entre syndicats et conseils d'etablissement en Allemagne. *Récomposition des systèmes de representation des salariés en Europe*. S. Laulom, Publications de l'Université de Saint Étienne, Waas, B. (2007). Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives - Germany *Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives*. R. Blainpain, Kluwer: 17-41.

contained in a collective agreement and correspond to a genuine interest of the workforce ensures the participation of the unions in this process of decentralisation and therefore the safeguard of the interests of the workforce (because there is the danger of dividing the representation in order to ensure the predominance of the employer – *divide et impera*). This is a form of control of the process of decentralisation and guarantee of participation of the trade unions. Finally, the increasing unionisation of the members of the works council and the changing interconnections between works councils and trade unions reveals that the division of functions is not so sharp and that there seems to be initiating a process of collaboration between trade unions and works councils. This is extremely important if we consider the increasingly relevant role that the works council (and alternative representative structures) seem to be having in the German panorama of industrial relations and the powers that they have in relation to industry agreements. This evolution seems to be an exemplification of how a system is currently undergoing a process of controlled decentralisation.⁵⁵⁵

The case of France is equally paradigmatic. France seems to have been experiencing a long but constant process of decentralisation of collective bargaining by providing an increasing relevance to the powers of the actors at the level of the company. The mechanism of “*controlled decentralisation*” seems to be more visible here because the trade unions have been collaborating and participating in the process of decentralisation. The seed of the process was planted by the Auroux Laws of 1982, which created several incentives for unionisation in companies deprived of union representation. The most important innovations were the recognition of the possibility to the representative unions to designate a staff-delegate as a shop-steward, which would be entitled to bargain the statutory procedure of bargaining the

⁵⁵⁵ Däubler, W. (2001). "Die novellierte Betriebsverfassung." Industrielle Beziehungen 8(4): 364-378, Natzel, I. (2001). "Die delegation von aufgaben an Arbeitsgruppen nach dem neuen §28a BetrVG." Der Betrieb(25): 1362-1364, Däubler, W. (2002). Betriebsverfassungsgesetz: kommentar für die praxis, Bund Verlag, Artus, I. (2003). "Die kooperation zwischen betriebsräten und gewerkschaften als neuralgischer punkt des tarifsystems. Eine exemplarische analyse am beispiel Deutschlands." Industrielle Beziehungen 10(2): 250-271, Blanke, T. (2003). "Arbeitsgruppen und Gruppenarbeit in der Betriebsverfassung - direkt demokratische Mitbestimmung als "zweiseitig paktierte Delegation"." Recht der Arbeit(3): 140-155, Busch, M. (2003). Arbeitsgruppen und gruppenarbeit im Betriebsverfassungsgesetz, Tenea, Däubler, W. (2006). Das Arbeitsrecht - die gemeinsame Wahrung von Interessen um Betrieb, Rowohlt Taschenbuch Verlag

organisation of work and working time. In addition, the laws equally created the *comité de groupe*, abolished thresholds for the setting up of trade union sections and redefined the functions of the works council as a means of collaborating with the employer. These innovations should not be underestimated: they introduced mandatory bargaining within companies, engaged employees in the life of companies (by bargaining the organisation of work and working time) and encouraged unionisation; the unions were not left out of this process because only employees affiliated or mandated by representative unions could bargain these procedures. This provided trade unions with a means of controlling the bargaining procedure.⁵⁵⁶ This trend continues in several steps; the law of 1993 created the single delegation, which encouraged the setting up of works councils and guaranteed union presence in them; the national agreement of 1995 partially reversed the *principe de faveur* that was prevalent in French law by admitting that lower level agreements could deviate (in certain subjects and conditions) from higher level agreements as long as the agent bargaining the agreement was a shop-steward or had a mandate from the union or was approved by an industry level paritary commission; the Aubry (1998 and 2000), Fillon (2004) and Bertrand (2008) laws continued this trend by allowing a controlled deviation from the standards laid out in higher level agreements; the Aubry laws allowed that the agreements for the reduction of working time be concluded by a shop-steward or an employee as long as they were both mandated by a majoritary union; if they were not mandated by a majoritary union (but a minority union), they were valid as long as they were approved in a referendum; the law of 2004 reversed the principle of favour by stating that the company level agreement could deviate from the industry level agreement unless the industry level agreement expressly stated otherwise; finally, the law of 2008 provided a greater margin of manoeuvre to derogatory agreements by allowing company-level employee representatives to deviate in the same conditions as a union subject however to the control of a union (by means of a paritary committee or by requiring that the

⁵⁵⁶ Auroux, J. (1983). "Un nouveau droit du travail?" *Droit Social*(1): 2-4. Verdier, J.-M. (1983). "La présence syndicale dans l'entreprise et la loi du 28 octobre 1982 relative au développement des institutions représentatives du personnel." *Droit Social*(1): 37-54.

agreement be concluded by a shop-steward or a mandated employee).⁵⁵⁷ This trend of decentralisation initiated in 1982 reveals that the focus of collective bargaining in France has clearly turned towards the level of the company as the company-level agents have an increasing power and increasing possibilities of deviation from higher level agreements. The trade unions were not left out of the process however since they have several forms of controlling the bargaining undertaken at the level of the company; as a rule, the agreements must be concluded by a shop-steward or a expressly mandated staff-delegate or subject to the approval of a paritary branch commission. This ensures a wide degree of union control over company-level bargaining.⁵⁵⁸

The case of the UK is equally representative of this trend. The monist system is suffering severe transformations and the trade unions have an increasing role in the British panorama of industrial relations. The foremost example is the statutory procedure for recognition, which in reality struck a strong blow to the voluntarist system that prevailed in the UK and created a duty to bargain with a (statutorily) recognised union for a period of three years. Although the scope of the duty to bargain is small (it merely covers pay, hours and holidays) it is expected nevertheless to have a strong impact; the threat of the procedure has encouraged the voluntary recognition of unions and the duty to bargain has had the reflexive effect of encouraging dialogue in other more substantial and delicate questions.⁵⁵⁹ The other great innovation in British law consisted in the introduction of elected representative structures. These structures were initially set up only for the bargaining of adaptation agreements (an euphemism for agreements deviating from the statutory standards) but

⁵⁵⁷ Borenfreund, G. (2004). "La négociation collective dans les entreprises dépourvues de délégués syndicaux." *Droit Social*(6): 606-620.

⁵⁵⁸ Julliot, S. (2005). Les turbulences au sein du double canal de représentation en France. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne, Mouret, J. (2007). Collective Relations in France: a multi-layered system in mutation. Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives. R. Blainpain, Kluwer: 41-65.

⁵⁵⁹ Hall, M. (1996). "Beyond recognition: employee representation and EU Law." *Industrial Law Journal* **25**(1): 15-27, Davies, P. L. and C. Kilpatrick (2005). La représentation des travailleurs au Royaume-Uni après le canal unique. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de L'Université de Saint-Étienne, Deakin, S., William S. Morris (2005). Labour Law. Oxford, Hart Publisher, Barnard, C. (2007). Worker Representation in the UK. Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives R. Blainpain, Kluwer: 83-103.

quickly spread to the information and consultation procedures in situations of transfer of undertakings and collective redundancies and in the transposition of Directive 2002/14. This raises the question of the relationship between elected and union representation, which was never posed before in the UK. The legislator gave a dubious answer; as regards the transfer of undertakings and collective redundancies, there is unequivocally a union priority as these structures may be set up only when no union is recognised in respect of a particular bargaining unit; as regards the transposition of Directive 2002/14, the existence of a union does not impede the setting up of these structures (even at the request of the employer). This raises the spectre of employer predominance because collective agreements are not mandatory in the UK. The unions have given a cautious answer to this problem: they either incorporate in collective agreements the information and consultation procedures demanded by Directive 2002/14 or they attempt to unionise the elected members in order to control the bargaining that takes place within the company.⁵⁶⁰ The combination of these elements reveals that the British system is slowly evolving towards more continental standards and that there is at least the attempt to introduce mandatory social dialogue at the level of the company; the priority still remains in the trade unions as they enjoy several prerogatives in relation to elected structures and they are attempting to control the procedures occurring within the company.

The Portuguese case is equally a feeble implementation of these principles. The innovation brought about by art.466CTP, which attributed to the shop-steward the competences of the works council in the implementation of the duties contained in Directive 2002/14, is significant because it attempted to introduce social dialogue in companies by means of the protection and activism of the trade unions. The evolution is similar to the one registered in France as the shop-steward (which must be elected by the employees of the undertaking and be designated by a trade union) enjoys a double-legitimacy and may

⁵⁶⁰ Davies, P. L. (1994). "A challenge to the single channel." *Industrial Law Journal* **23**: 272 ff, Davies, P. and M. Freedland (2004). National Report United Kingdom. *The evolving structure of collective bargaining in Europe 2004*. S. Sciarra, European Commission, University of Florence, Davies, P. L. and C. Kilpatrick (2005). La représentation des travailleurs au Royaume-Uni après le canal unique. *Recomposition des systèmes de représentation des salariés en Europe*. S. Lailom, Publications de L'Université de Saint-Étienne, Davies, P. L. and M. Freedland (2007). *Towards a Flexible Labour Market: labour legislation and regulation since the 1990s*, Oxford. Deakin, S., William S. Morris (2005). *Labour Law*. Oxford, Hart Publisher.

exercise the competences of the works council while maintaining a connection with a trade union. In addition, there are new specifically elected bodies for particular procedures (such as collective redundancies), which ensure representation of employees when it is most needed.⁵⁶¹

This description of the evolution of the actors at the level of the company in each system is able to demonstrate the extent to which each system is evolving towards a controlled decentralisation of its structures of collective bargaining; the actors at the level of the company are clearly having a more relevant role while the trade unions are controlling the actions of these actors in order to ensure that they correspond to the genuine interest of the employees and of the needs of the company and not to the interest of the employer to undermine social dialogue and union power.

The evolution of the actors cannot be disconnected from the evolution registered in the subject of collective agreements however: the representation of employees exists to function as an interlocutor with the employer and the strength of the actors can be seen in the agreements concluded with the employer. That will be the object of the next section.

⁵⁶¹ Gomes, J. V. (2004). National Report Portugal. The evolving structure of collective bargaining in Europe 1990-2004. S. Sciarra. Florence, European Commission, University of Florence. Lobo Xavier, B. (2004). Curso de Direito do Trabalho, Verbo, Monteiro Fernandes, A. (2004). Direito do Trabalho, Almedina, Romano Martinez, P. (2008). Direito do Trabalho, Almedina.

5.2.3. The Evolution of Collective Agreements

The understanding of the reach of the process of decentralisation of collective bargaining that is currently occurring cannot be limited to the analysis of the actors; the diversification of the role of the actors at the level of the company was accompanied with the emergence of new types of company-level agreements concluded by these same actors that seem to be in the process of changing the traditional nature of industrial relations and posing considerable challenges to the former types of collective agreements. The purpose of this section is to analyse the new types of agreements that are being developed within companies. This section will begin by describing briefly the traditional function of collective agreements in order to best understand its evolution. The evolution of collective bargaining in the jurisdictions covered appears to exhibit three new types of agreements, which were coined as (a) *flexibilisation* agreements, (b) *procedural* agreements and (c) *anticipatory* agreements. The following sections will attempt to analyse each one of these agreements in detail and explain their significance within the system before ending with a comparative conclusion on the main common characteristics of these agreements and their function. It will be defended that these agreements appear to exhibit the characteristics of a contractarian and stakeholder inclusive view of the firm since they appear to be designed to reduce the agency costs that occur between the management and the workforce in face of stronger shareholder and product market pressure (the so-called insider-outsider conflict).

5.2.3.1. The traditional function of collective agreements

The description of the evolution of collective agreements must begin with a description of the traditional function of collective agreements. Although this was previously made in the analysis of the institutional complementarities between the traditional patterns of corporate governance and collective bargaining, it is nonetheless useful to make a short recapitulation in order to better contextualise and understand the evolution. Collective agreements consist in a regulatory agreement bargained between a trade union and an individual employer or employers' association with the purpose of regulating collectively the terms and conditions of work. The rationale underlying collective

bargaining has been an intensely debated topic: whereas some see it merely as a labour cartel, others emphasize its nature as a human right and as a means of reducing the asymmetry of bargaining powers that exists between employees and individual employers.⁵⁶² One recent ruling analysing the rationale of collective bargaining came from Canada, whose Supreme Court ruled in 2007 in the case *Facilities Subsector Bargaining Assn. v. British Columbia* that:

(1) The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work.

(2) Collective bargaining is not simply an instrument for pursuing external ends...rather [it] is intrinsically valuable as an experience in self-government.

(3) Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives.

This enunciation of the finalities underlying collective bargaining allows us to understand that collective bargaining is not simply a labour cartel but a form of self-government to enforce an ideal of industrial democracy. As a general point, one may observe that collective bargaining performs the following functions. Firstly, it performs an important role in the reduction of transaction costs associated with bargaining because it provides for a standard level of working conditions applicable to a large group of workers. Secondly, it allows companies to adapt the working conditions to their own specific needs or to the needs of the industry instead of claiming specific rules from the central government. Finally, it may be equally institutionally complementary to the predominant corporate governance structure that predominates in each country. The former paragraphs attempted to enunciate the institutional complementarities between the predominant corporate governance and collective bargaining patterns and it was defended that insider and governmental patterns of corporate governance privileged bargaining at industry level and market forms of corporate governance privileged more decentralised forms of collective bargaining. The organisation of work equally had a strong influence in this pattern because some insider patterns of

⁵⁶² Posner, R. A. (2007). *Economic analysis of law*, Aspen.

corporate governance and industry level bargaining are ideal to the development of fordist structures and more decentralised patterns are ideal to the development of alternative forms of organisation of work. The combination of these elements (corporate governance, firm organisation and the functions of collective bargaining) assists in explaining the developments of particular patterns of collective bargaining.

The institutional endowment in which these traditional patterns developed underwent strong transformations over the last 30 years. The overall economic environment transitioned from corporatist capitalism towards financial capitalism, the international competitive pressure increased to a great extent, the governance patterns of companies have been undergoing strong modifications and the patterns of organisation of work are underpinned today in the idea of lean production, which privileges decentralisation of company structures. This has to have a repercussion in the traditional patterns of collective agreements. The former paragraphs enunciated the transformations occurred in the actors; it was defended that each country is increasingly empowering the actors at the level of the company in a phenomenon coined as controlled decentralisation in order to achieve a more company-friendly bargaining. The purpose of this section is to analyse the transformations occurred at the level of the agreements. It will be attempted to demonstrate the extent to which the organisation of collective agreements is adapting in order to be able to perform the functions demanded from it, namely: (a) the reduction of transaction costs, (b) the establishment of industrial democracy, (c) the adaptation to the new corporate governance patterns.

5.2.3.2. New types of agreements

The panorama of collective bargaining has been undergoing considerable developments in each country under study as new types of agreements have emerged. The new agreements are bringing about some considerable modifications to the previous structure of collective bargaining both in terms of structure and content. In terms of structure, these agreements are increasingly being decentralised towards the level of the company; in this ambit, the prevalent level of bargaining is steadily becoming the company-level. This raises serious questions of the modes of articulation with the sector level and

its future; each country has provided a distinct answer to this problem that must be seen within its due context. As a preliminary word it may be said that the decentralisation of collective agreements does not imply the end of the industry agreements but merely a redefinition of their roles and relationships; the industry level will maintain its function of regulating the labour market and will set a limit to the creativity of company-level collective agreements; this is nothing but the idea of controlled decentralisation enunciated above at the level of the actors. As regards the contents, it is noticeable that the substance of collective agreements is undergoing severe transformations. It is apparent that collective agreements are increasingly concerned with the needs of specific companies and with the provision of instruments for company-specific implementation. This is particularly evident in times of crisis and the recognised possibilities of deviation. The German legal literature has coined this new policy as a company-friendly collective agreement (*Betriebsnäher Tarifpolitik*).⁵⁶³ The evolution described above of the actors provided us with a hint of the new culture of collective bargaining that is being developed as the increasingly stronger role that the actors at the level of the company are gaining is coupled with the development of the new types of agreements. The purpose of this section is to describe the new types of agreements that are being developed. These agreements may be classified in three distinct types: (a) *flexibilisation* agreements, which provide for possibilities of deviation from the level of the sector under certain conditions, (b) *procedural* agreements, which intend to enhance the communication channels between the employer and the employee representatives at the level of the firm and reduce the agency costs within the company and (c) *partnership* agreements, which consist in a pact between employer and employees intended to engage employees more actively in the life of the company. The following sections will analyse each one of these agreements in detail.

⁵⁶³ Henssler, M. (1998). "Firmentarifverträge und Unternehmensbezogene Verbandstarifverträge als instrument einer "flexiblen" Betriebsnahen Tarifpolitik." Zeitschrift für Arbeitsrecht 29(4): 517-542.

5.2.3.2.1 Flexibilisation agreements

Flexibilisation agreements consist in a type of agreements that allow for the deviation from the standards laid out in industry agreements. These agreements allow companies – under certain conditions – to agree with employee representatives some company-specific provisions that deviate considerably from the standards laid out in industry level agreements in order to safeguard the interests of the workforce within the company. These agreements are normally connected to situations or crisis in which a temporary reduction of the standards laid out in industry level agreements is seen as the only means of preserving the employment levels at the undertaking. They are not reduced to situations of crisis though; other types of flexibilisation agreements consist in the power to determine the management of the working-time at the company-level (in deviation from the standards laid out at the industry level) in order to allow the company to adapt more easily to the economical fluctuations or to the requirements of specific clients; this is particularly important for small and medium companies that work as outsourcers for a reduced number of major companies and that are highly dependent on the demands of these major companies in order to survive on the market. These types of flexibilisation agreements (crisis agreements and adjustment agreements) are destined to attract social dialogue to the level of the company and make it more flexible in the task of providing an answer to the demands of competitors, major clients and shareholders. They should not be understood merely as an instrument of downgrading labour standards by means of the justification of competition or crisis but truly as a means of making the company more competitive, able to respond rapidly to fluctuations and to the demands of the major shareholders and stakeholders of the company. In this sense, they encourage the alignment of interests between the management and employees vis-à-vis shareholders and stakeholders (the so-called insider/outsider conflict) and provide employees with a means of safeguarding their interests.⁵⁶⁴ This possibility of derogation from the industry level agreements was not made without limits however as all the countries

⁵⁶⁴ Höpner, M. (2005b). "What connects Industrial Relations and Corporate Governance? Explaining institutional complementarity." *Socio-Economic Review* 3(2), Boni, G. (2008). "Regards extérieurs et comperés sur les accords collectifs conclus lors des restructurations." *Semaine Sociale Lamy*(1376): 47-58.

under study placed several limits to the possibility of deviation from the industry level standards in order to avoid the abuse of these instruments of flexibility. The trade unions have an extremely important role to play in this matter, as they were the ones who were trusted with some power to control the possibility of deviation from the collectively agreed standards. These flexibilisation agreements may be considered as the utmost example of the idea of controlled decentralisation enunciated above. The following lines will attempt to explain to which extent each one of the jurisdictions under study implemented these flexibilisation agreements into their own legal system.

(a) Germany – the almighty power of the *Flächentariffvertrag* and the barrier posed by §77(3)BVG currently correspond more to a myth than to the proper reality. This sentence deserves a more elaborate explanation. The industry level agreement (*Flächentariffvertrag*) is - together with the statutory law - arguably still the most important source of regulation of labour relations in Germany. The use of incorporation clauses (*Verweisungsklauseln*) and the pressure to join employers' associations still ensure a wide coverage of collective agreements (64%).⁵⁶⁵ The increasing criticisms that have been made since the beginning of the 1980s to the rigid nature of collective agreements led the social partners to devise alternative strategies to flexibilise the application of collective agreements and make them more company-friendly in order to avoid an escape from collective bargaining (expressively coined as *Flucht aus dem Tarifvertrag*). The reasons behind this increased criticism to collective agreements are manifold and they must be understood in their entire set: the internationalisation and globalisation of the markets exposed German companies to a stronger and more aggressive international competition with companies with diverse governance structures that demanded an adaptation of the behaviour of companies to these new realities; the modifications occurred in the structure of companies (progressive end of fordism and introduction of lean production) greatly modified the internal and external borders of companies rendering the existing collective agreements (which were thought

⁵⁶⁵ Data collected from the database of the ETUI available in http://www.worker-participation.eu/national_industrial_relations/across_europe/collective_bargaining__1

for the fordist production structure) inadequate; the mediations occurred in the governance of companies altered the stable equilibrium between managers, workers and major shareholders and exposed companies to the pressures of institutional shareholders and the stock markets. The existing collective agreements were increasingly criticised for not being sufficiently flexible in order to cope with these new realities and a more decentralised culture of bargaining, underpinned in an understanding between the managers and the employees, began to develop in the 1980s. The trade unions and the employers' associations understood the direction of this current and began to develop more flexible forms of collective agreements in order to be able to adapt the existing structures of collective bargaining to these new realities.⁵⁶⁶

One type of agreement – or better, a clause within the agreement – that flexibilised the application of collective agreements consisted in the absence of the duty to be bound by a collective agreement even when the employer is a member of the employers' association. These clauses are named as OT-Mitgliedschaft (*Ohne Tarifbindung-Mitgliedschaft*), which may be roughly translated as “*membership without collective agreement*”. These clauses are destined to encourage the affiliation of employers to employers' associations and to benefit in full from their services without being bound to the provisions of the collective agreement signed with the competent trade union. The first clause of this nature was inserted in a collective agreement concluded by the *Verband des Holz- und kunststoffverarbeitenden Industrie Rheinland-Pfalz*⁵⁶⁷ as a response to declining membership and consequential escape from collective agreements and quickly spread to other sectors of activity. The purpose with remaining a member of an association not bound to a collective agreement must be seen within the praxis of collective bargaining. If companies exit employers' associations they will become an easy target for the strike power of the unions as they are not bound by the duty of industrial peace. The membership of the organisation shields them against strikes. Within the

⁵⁶⁶ Rieble, V. (1996). "Krise des Flächentarifvertrages?" *Recht der Arbeit* 49(3): 151-158, Zachert, U. (1996). "Krise des Flächentarifvertrages?" *Recht der Arbeit* 49(3): 140-151, Hanau, P. (1998). "Der Tarifvertrag in der Krise." *Recht der Arbeit* 51(2): 65-71, Streeck, W. and B. Rehder (2003). *Der Flächentarifvertrag: Krise, Stabilität und Wandel* Max Planck Institute für Gesellschaftsforschung.

⁵⁶⁷ Association of employers of the wood and plastic processing industries of Rheinland Palatinate.

employers' association, although the member is in principle not bound to a collective agreement, the pressure of the other regularly bound employers at least obliges the member to justify its option not to abide by the collective agreement. This helps the employers' association to understand the specific needs of these companies and to assist them at a latter stage in the conclusion of a single employer agreement with the industry union in order to adequate the collectively agreed provisions to the specific needs of its company. Therefore this *OT-Mitgliedschaft* clauses are not a means of escaping collective agreements but a means of maintaining employers within the employers' associations, insert their specific needs into the *Tarifpolitik* and attempt at a later stage to bargain specific agreements with them in order to arrange a more company-friendly industrial policy.⁵⁶⁸

The extensive use of single-employer agreements as an alternative to association level agreements consists in another means of flexibilising the application of industry agreements and achieving a more decentralised culture of collective bargaining. German law recognises to individual employers the right to conclude collective agreements (§2BVG). In contrast to France, where the *principe de faveur* prevented the eviction of the higher level by the lower level agreements, the competition between collective agreements is regulated by the principle of speciality (*Spezialitätsgrundsatz*): in case of conflict, the collective agreement that contains provisions closest to the situation of a concrete undertaking applies because only one collective agreement can be applied in a given undertaking (the so-called principle of the single collective agreement (*Tarifeinheit*)). When the employer is a member of an employers' organisation, the question of knowing whether the organisation allows him to conclude a concurrent collective agreement is to be decided in accordance with the internal by-charters of the association. Employers' associations have been progressively favouring the conclusion of such agreements by individual employers when the employer reveals the concrete reasons why the industry level agreement is not appropriate to him. If the employer provides the association with reasonable arguments for the conclusion of a company-level

⁵⁶⁸ Richardi, R. and O. Wlotzke (2000). *Münchener Handbuch zum Arbeitsrecht*. München, C.H Beck, Rieble, V. (2004). "Die akteure im kollektiven Arbeitsrecht." *Recht der Arbeit* 57(2): 78-86, Waas, B. (2007). Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives - Germany *Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives*. R. Blainpain, Kluwer: 17-41.

agreement in deviation from the industry level agreement then the employers' association may approve or refrain from undertaking disciplinary actions against individual employers who choose this form of bargaining. Although trade unions generally do not favour the conclusion of these agreements because they prefer to focus their action at the level of the industry and are reluctant to allow for the deviation from the compromises, they have been progressively accepting the conclusion of these agreements in order to achieve a more company-friendly Tarifpolitik. This is so by a number of reasons: the fact that trade unions enjoy a monopoly at the level of the sector guarantees that the same trade union that concluded the industry level agreement is going to conclude the (deviating) company-level agreement; this provides the trade union with the possibility to verify the reasons behind the requirement to deviate and ensure a collective representation of employee interests at the level of the company. On the other hand, the double control exercised by the employers' association on the requirement of the member to escape from the provisions of the company-level agreement (and the general social pressure exercised by the other employers who make efforts to abide by the provisions of the agreement) ensures the legitimacy of the reasons provided. This allows us to have a controlled decentralisation of collective bargaining because the deviation from the provisions of the industry agreement by the single employer is controlled both by the employers' association and by the trade union. The reality is that this use of single-employer agreements as an instrument of controlled decentralisation has been so successful that the number of single-employer agreements almost parallels the number of industry-level agreements. In accordance with data from 2003, 59.636 collective agreements were in force in Germany (in more than 300 branches), which may be broken down into 33.100 industry level agreements and 26.500 single-employer agreements (44,4% of the total number of agreements).⁵⁶⁹ Finally, even the case law of the German Labour Courts provided an impetus to the conclusion of these single-employer agreements as a means of decentralising industrial relations and achieving a more company-friendly collective bargaining. In a widely commented decision, the BAG decided that a trade union could undergo

⁵⁶⁹ Fuchs, M. (2004b). National report Germany. The evolving structure of collective bargaining in Europe. U. o. F. European Commission. Florence.

strike action against an individual employer that was a member of an employers' association and bound by an industry agreement in order to force him to conclude a single-employer agreement. The strike would become illicit only when it was envisaged to force the employer to leave the employers' association or when the question was covered by the industry agreement.⁵⁷⁰ These examples provide us with an illustrative example of the current trend of decentralisation of collective bargaining that is occurring in Germany by means of the use of single-employer agreements (amid other instruments).⁵⁷¹ The advantages are a double control exercised by both the trade union and the employers' association and the fact that the same party that concluded the industry level agreement – the trade union - collectively regulates the process of decentralisation.

This use of single-employer agreements as an instrument of decentralisation does not come without criticisms however as some see in it a dangerous mean of undermining the purposes of collective bargaining. There have been several criticisms pointed out to this policy: firstly, there is a disparity of power between the union (who is organised at the industry level) and the individual employer because unions are much more capable of financially supporting strike actions that are potentially much more damaging for an individual employer than the ones undertaken at the industry level; this disparity of power would compromise potentially the results of the individual agreement. Secondly, an expansion of single-employer agreements may have dreadful consequences for the industry level agreements; the remaining employers will not be so willing to make sacrifices to abide to the conditions imposed in the industry level agreement and claims for deviation may increase. Thirdly, this single-employer policy is concerned essentially with protecting the jobs of the insiders, leaving no room for consideration of the interests of the

⁵⁷⁰ Decision of the BAG of 10 December 2002. See the commentary of Buchner, H. (2003). "Kommentar BAG 10.12.2002." Recht der Arbeit: 367 ff.

⁵⁷¹ Schnabel, C. (1998). The reform of collective bargaining in Germany: corporatist stability vs firm flexibility. The German Model of Industrial Relations between Adaptation and Erosion. R. Hoffman, O. Jacobi, B. Keller and M. Weiss. Düsseldorf, Rémy, P. (2004). Une redistribution des compétences entre syndicats et conseils d'établissement en Allemagne. Récomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint Étienne, Zachert, U. (2005). Dezentralisierung des Tarifvertrages: der einzelne Arbeitgeber als Tarifpartei Arbeitsrecht im sozialen Dialog - Festschrift für Hellmut Wissmann zum 65. Geburtstag. W. Kohte, H.-J. Dörner and R. Anzinger. München, C.H. Beck: 201-212.

outsiders in collective bargaining. The economical situation of the industry and the need to increase occupational levels should be discussed at the industry level. Finally, the transfer of the wage bargaining to the company level is capable of disturbing the company-peace and creates conflicts between the employer and the rank and file that the *Betriebsverfassungsgesetz* intended to avoid. The critics of these single-employer agreements propose that the strength of the industry agreement should be maintained with the possibilities of a controlled decentralisation at the company level.⁵⁷²

This serves as an introduction to the last form of decentralisation in the form of flexibilisation agreements that may be found in German Law - the opening clauses (*Öffnungsklauseln*). Opening clauses consist in conventions inserted into industry agreements that allow individual companies to deviate under certain conditions and within certain limits from the provisions contained in them. It is a form of controlled decentralisation because it is the industry agreement itself (and therefore the parties to the agreement) that lay out the limits for its deviation. Opening clauses first appeared in 1984 in the Leber case in the context of a strike in the metallurgical sector (Leber was the name of the mediator) and they have been multiplying throughout the industries progressively originating a revolution in collective bargaining. The origin of the opening clauses may be sought in the need for differentiation of individual companies in the industry concerned. This need for differentiation and the multiplication of opening clauses reached such an extent that the German Confederation of Trade Unions (DGB – *Deutscher Gewerkschaft Bund*) laid out in its program in 1996 that there was a need to rethink the relationship between the collective agreement and its implementation in companies in terms that (1) the collective agreement took into consideration the distinct needs of companies and effectively conform (*Gestalt*) the unique conditions of each branch and companies and (2) the regulation of wages and minimum working conditions in collective agreements should remain the central element in order to guarantee the mandatory establishment of minimum conditions. This means, in essence, that the predominance of the collective agreement should not be questioned but it should nevertheless allow for a certain degree of

⁵⁷² Molitor, K. (1998). Ende oder Reform der Flächentarifverträge? *Tarifautonomie für ein neues Jahrhundert - festschrift für Günther Schaub zum 65 Geburtstag*. M. Schlachter, R. Ascheid and H.-W. Friedrich. München, C.H Beck: 487-496.

differentiation in its application.⁵⁷³ The introduction of opening clauses in collective agreements led to the development of new types of collective agreements. These collective agreements, which were applicable previously like statutory law throughout the industry, now contained a set of clauses that allowed for a certain deviation from its provisions by means of an agreement with the works council. There were several variations of these clauses. They may consist in (a) a framework regulation (*Rahmenregelung*), (b) an optional regulation (*Optionen*; *Kafeteriaklausel*) or (c) an *opening clause* properly said. A framework regulation consists in a set of principles to be implemented at the company level by means of an agreement with the works council; it consists in a regulatory technique in which instead of laying out a detailed regulation, the collective agreement would contain merely principles, mechanisms and indications (*Grundsätze, Spannen und Richtwerte*) to be implemented at the level of the individual company by means of an agreement with the works council; an optional regulation consists in a set of concrete regulations from which the company may choose from by means of an agreement with the works council; the parties to the collective agreement would take into account the needs of the industry and of the individual companies and design a set of alternatives which contained several trade-offs between them; the individual company would then be free to choose between these different options by means of an agreement with the works council, *i.e.* the company would choose the regulation that is more appropriate to their individual situation from a set of pre-determined options contained in the collective agreement. Finally, the opening clause properly said consists in an express permission contained in the collective agreement of the works council to complete, modify or replace the provisions of the collective agreement by means of an agreement with the employer. The collective agreement itself would allow the parties at the level of

⁵⁷³ Gentz, M. Ibid. Werden die geltenden Tarifverträge der betrieblichen Praxis gerecht?, 1998: 205-217, Kittner, M. (1998). Öffnung des Flächentarifvertrags. Tarifautonomie für ein neues Jahrhundert - festschrift für Günther Schaub zum 65 Geburtstag. M. Schlachter, R. Ascheid and H.-W. Friedrich. München, C.H. Beck: 389-420, Rémy, P. (2004). Une redistribution des compétences entre syndicats et conseils d'établissement en Allemagne. Récomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint Étienne.

the company to deviate from its provisions by means of a company agreement that would complete, modify or replace the collectively agreed provisions.⁵⁷⁴

The industrial relations literature has been studying these clauses and they have been able to present us with a typology of the types of agreements reached. The more common clauses deal with the subjects of wages and working time and they may be classified as (a) opening clauses for working-time arrangements, (b) working-time reduction without compensation in pay and (c) hardship and exemption clauses. Opening clauses for working time arrangements are normally framework or optional clauses that lay out the maximum limits of working time for each week and for a reference period and allow individual companies to determine the concrete arrangements for their implementation; an agreement with the works council will implement these provisions in accordance with the needs of the company; if the clause is merely a reference clause, it merely contains the limits and leaves their implementation to the individual company, which is subject merely to the maximum weekly working time and the maximum average working time for a reference period; if it is an optional clause, it will merely contain a set of working time schemes to be implemented by agreement (e.g: in times of need the maximum daily working time is increased by two hours but the working week has only four days or the increased in one week period compensated by a reduction in the following period). A working time reduction without compensation in pay consists in a modality of lay-off in which the employer is entitled to reduce the working time of all or some of its employees during a reference period in order to cut costs and avoid redundancies. It is normally an option clause because there is a set of possible reductions to choose from. The reduction of working time and pay must be made by means of an agreement with the works council. The use of this option was widespread and very successful; a survey ordered by Gesamtmetall in 1994 concluded that a 10% reduction in working time in the

⁵⁷⁴ Gaumann, R. and M. Schafft (1998). "Tarifvertragliche Öffnungsklauseln - ein sinnvolles Flexibilisierungs instrument." Neue Zeitschrift für Arbeitsrecht(4): 177-187, Kittner, M. (1998). Öffnung des Flächentarifvertrags. Tarifaufonomie für ein neues Jahrhundert - festschrift für Günther Schaub zum 65 Geburtstag. M. Schlachter, R. Ascheid and H.-W. Friedrich. München, C.H Beck: 389-420.

former 4 years had saved 50.000 jobs in the industry.⁵⁷⁵ Hardship and exemption clauses consist in opening clauses properly said because they allow for a true deviation from the standards laid out in the collective agreement as long as it is necessary to pursue a legitimate aim. They are normally surrounded by precautions in order to avoid an escape from the collective agreement. For instance, some collective agreements contained a clause that stated that if a company was close to bankruptcy, they could require exemption from the collective agreement. In doing so, they had to demonstrate that they were effectively close to bankruptcy but that they had a convincing strategy for economic viability. If the social partners agreed with the seriousness of the conditions in the company and the viability of the plan proposed then they could authorise the exemption from the collective agreement; the conditions of exemption were then bargaining with the works council. Other types of exemption clauses pursued social aims: for instance, there were clauses that provided that, in case of small and medium-sized companies that created employment in the industry concerned, they could be exempted from paying holiday and Christmas bonus to their employees in order to create more jobs; other clauses stated that if a company agreed to hire certain groups of disadvantaged employees (long-term unemployed or workers looking for a first job) they could be exempted from some of the duties contained in the agreement. The examples reveal that the social partners have been attempting to decentralise collective bargaining by allowing for some differentiation but at the same time carefully avoiding delegating excessively decision-making rights to the plant level; the decentralisation has been a controlled decentralisation within the limits laid out by the industry agreement, whose predominance and central role remained unquestioned.⁵⁷⁶

The legitimacy and limits of these clauses at the light of the German Constitution and the *Betriebsverfassungsgesetz* have been raising a considerable degree of discussion because they modify to a certain extent the traditional balance of powers between the social partners that underpinned the

⁵⁷⁵ Bispink, R. and T. Schulten (2003). "Decentralisation of German collective bargaining - current trends and assessments from a works and staffs council perspective." *WSI Mitteilungen* (special issue): 24-41.

⁵⁷⁶ Hassel, A. (1999). "The erosion of the German system of Industrial Relations." *British Journal of Industrial Relations* 37(3): 483-505.

German economy for more than 30 years. The main idea underpinning the division of powers between the trade unions and the works councils and the prohibition of works council intervention in matters covered by collective agreements served as a means of ensuring the equality of competition between undertakings in the industry (because it bypassed the possibility of competition in term of labour costs) and avoided the transfer of social conflicts into the undertaking that could endanger the “*company peace*”. This is so fundamental in the German industrial policy that it even enjoyed a constitutional recognition of this corporatist structure of the economy by means of §9(3) of the German Constitution.⁵⁷⁷ The introduction of opening clauses raised several questions of a constitutional and statutory nature because they are capable of bringing about a considerable degree of transformations to the self-regulatory tradition embedded in the German Constitution. The main discussion concerning these clauses may be subsumed to three great questions: (a) does the constitutionally protected collective autonomy allow the possibility of the social partners renouncing their competence to regulate certain issues; (b) in the affirmative case, what are the limits to that possibility of deviation; (c) what about non-affiliated employees? The following paragraphs will analyse the main points surrounding these questions in detail.

The first question addresses the legitimacy of these clauses at the light of the constitutional recognition of the freedom of association. §9(3) of the German Constitution allows the setting up of associations for the guarantee and promotion of the conditions of work and of the economy. The constitutional interpretation of this provision led to the development of a system of trade union monopoly at the level of the industry in order to guarantee a certain corporatist structure of the economy: the main current of interpretation saw in §9(3) of the German Constitution a delegation of the State to the social partners in the task of determining the conditions of work in the industry by means of social dialogue.⁵⁷⁸ The insertion of opening clauses in collective

⁵⁷⁷ Däubler, W. (2006). Das Arbeitsrecht - die gemeinsame Wahrung von Interessen im Betrieb, Rowohlt Taschenbuch Verlag

⁵⁷⁸ Schaub, G. (1996). Arbeitsrechtshandbuch - systematische darstellung und nachschlagewerk für die praxis, C.H Beck, Fuchs, M. (2004b). National report Germany. The evolving structure of collective bargaining in Europe. U. o. F. European Commission. Florence, Däubler, W. (2006). Das Arbeitsrecht - die gemeinsame Wahrung von Interessen im Betrieb, Rowohlt Taschenbuch Verlag

agreements is capable of disturbing this traditional structure because its practical effect is to allow for a differentiation in the conditions of work applicable in the industry (which may undermine competition between the undertakings) and endanger the regulatory function of collective agreements. This led many to question their constitutionality in the first line. The main arguments of the legal thinking tend to favour the conclusion of these clauses, although the justifications vary to a great extent. Manfred Löwisch, in an extremely interesting article, considered that these clauses are not only admissible but equally imposed at the light of the German Constitution. In the view of this author, the social partners are not only free to renounce their constitutional competence to regulate the working conditions at the level of the industry and allow for individual deviations in collective agreements; they are equally mandated to do so by the German Constitution. Since the mandatory effects of collective agreements (§9(3)GG and §4TVG) interfere with the constitutionally protected fundamental freedoms of contract (*Vertragsfreiheit*) and to choose an occupation (*Berufsfreiheit*) (§2 and 12GG), the constitutional principle of proportionality mandates that §9(3)GG be put aside when the social partners are unable to perform their functions – the protection of the employees in times of entrepreneurial crisis. One means to achieve this is by the notice of withdrawal (*Kündigung*) of the collective agreement on the basis of an important reason (the preservation of employment). Since that would lead to an escape from collective bargaining, the most appropriate solution seems to be an interpretation of §77(3) BVG in accordance with the German Constitution according to which the works council would not be prevented from deviating from collective agreements in times of crisis that threatened the existence of the company and of the labour posts.⁵⁷⁹ This position of Löwisch is a bit extreme and raises several constitutional and statutory doubts that could only be answered by a ruling from the German Constitutional Court.⁵⁸⁰ The merit of the opinion of Löwisch consists in laying out that the reach of §9(3)GG is not absolute but it must be balanced with other considerations. This led the legal

⁵⁷⁹ Löwisch, M. (1997). "Tariföffnung bei Unternehmens- und Arbeitsplatzgefährdung." *Neue Juristische Wochenschrift*(14): 905-911.

⁵⁸⁰ The main questions consist in (1) the precise content of §9(3)GG, (2) the articulation between §9(3)GG and other constitutionally recognized principles (the freedom of contract and the freedom to choose an occupation - §§2 and 12GG) and (3) if laws can be prevented by means of a constitutional interpretation.

thinking to propose other less drastic interpretations of opening clauses at the light of §9(3)GG. The opinions of Patrick Remy and Völker Rieble are exemplary in this aspect because they synthesise the discussion surrounding the legitimacy of opening clauses. In accordance with the view of these authors, the constitutionally recognised freedom of association and the particular content that it enjoys in the German Constitution entails in it the power to refrain from regulating a certain subject. The power recognised to the social partners to regulate a certain subject (wages and working conditions at the industry level) necessarily entails within it the power to refrain from regulating these subjects. The opening clause should not be understood as a delegation of regulatory competence to the company-level but simply an abstention to regulate a certain subject in certain occasions (normally situations of crisis). This means that since the subject is not regulated in a collective agreement, the barrier effect (*Sperrwirkung*) of §77(3)BVG would not apply and the company-level actors would be free to regulate the issue by means of a company-agreement. The competence to regulate the issue belongs to the works council in its entirety because there is no barrier posed by a collective agreement at the light of §77(3)BVG. This is not an empowerment of the works council by means of a collective agreement but merely a refusal to regulate a certain issue, which fits within their constitutionally recognised regulatory powers, thus opening roads to the original competence of the works council.⁵⁸¹ Independently of the justifications, one conclusion seems to impose: the particular role attributed to the social partners in the German Constitution (§9(3) GG) is no obstacle to the insertion of clauses in collective agreements that allow for a deviation of the collectively agreed standards at the company-level. This opens room for a decentralisation of collective bargaining towards the level of the company by means of derogatory agreements.⁵⁸²

This raises the question of the limits (if any) to the possibilities of deviation. The position of the legal thinking was once again harmonious as to the result but not as to the reasons. As a preliminary word, one may say that all

⁵⁸¹ Rémy, P. (2004). Une redistribution des compétences entre syndicats et conseils d'établissement en Allemagne. Récomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint Étienne, Rieble, V. (2004b). "Öffnungsklauseln und Tarifverantwortung." Zeitschrift für Arbeitsrecht 35(3): 405-429.

⁵⁸² Däubler, W., M. Kittner, et al., Eds. BetrVG mit Wahlordnung und EBR-Gesetz, Bund-Verlag, Däubler, W. (2002). Betriebsverfassungsgesetz: kommentar für die praxis, Bund Verlag.

the authors seem to recognise the legitimacy of the possibility of deviation as long as it is subject to certain limits; the deviation from the collectively agreed standards should serve to preserve occupational levels and avoid bankruptcy and not to empty the collectively agreed standards, which would not only undermine industry agreements but equally the competition between undertakings in the sector. It is worth seeing each one of the arguments in detail. Zachert ⁵⁸³ began by pointing out that the freedom guaranteed to the social partners to regulate the economy and working conditions in a particular industry does not imply a duty to regulate it to its fullest extent so as to preempt the autonomy of the company-level actors. The regulatory freedom contained in §9(3)GG implied the admissibility of a partial waiving of the regulatory power as long as (a) the question could be dealt autonomously by the company-level actors, i.e. it fell within their powers and (b) there were limits to the possibility of deviation so that the hard-core of the collective autonomy would be preserved.⁵⁸⁴ The idea underpinning the reasoning of Zachert seemed to be the setting of limits to the possibilities of deviation so that the adaptation to difficulties would not result in a general escape to collective agreements; the industry agreement should be preserved as the main source of law in the sector and the possibilities of deviation should be exceptional and respect the constitutionally guaranteed collective autonomy. This serves as an introduction to a very interesting thesis developed by Baumann that was coined as the theory of essentiality (*Wesentlichkeitslehre*). Drawing upon the delegation laws contained in §80GG (i.e. laws authorising other bodies to enact laws and regulations, functioning as an administrative act of delegation) and the duties to which those laws are subject (legal security (*Rechtssicherheit*) and legal certainty (*Rechtsvorsehbarkeit*)), the author concluded that opening clauses should be admitted as long as they fulfilled these two preconditions: the employees subject to the collective agreements should be perfectly informed beforehand of the possibilities of deviation from those same agreements. This opinion of the author brings attention to an important limitation of the reach of opening clauses: they are admissible as long as they

⁵⁸³ Zachert, U. (1996). "Krise des Flächentarifvertrages?" *Recht der Arbeit* 49(3): 140-151.

⁵⁸⁴ Zachert, U. (1996). "Krise für den Flächentarifvertrages? Herausforderungen für das Tarifrecht." *Recht der Arbeit*: 140-151.

do not empty the collective autonomy and the best means to do so consists in laying out in clear terms in the collective agreement itself the extension of the possibilities of deviation; this thesis has two advantages: it ensures that the possibilities of deviation are collectively agreed (thus ensuring a wide degree of consensus in the industry) and prevents the use of the notice of termination (*Kündigung*) of collective agreements in situations of need proposed by Löwisch as a means of deviation because it would be uncontrollable.⁵⁸⁵ The combination of these theories assists us in understanding the proposals made by Henssler and Däubler as regards the limits of collective agreements. In accordance with the view of these two authors, opening clauses are admissible as long as they contain the limits to the possibilities of deviation; a free card to deviate is inadmissible because that would undermine the constitutionally protected collective autonomy but a certain margin of freedom in the determination of the working conditions at the level of the company (even if it leads to a deviation from the collectively agreed standards) is admissible as long as (a) it is expressly provided for in a collective agreement, (b) it contains limits to the possibilities of deviation and (c) it expressly lays down the preconditions under which it may be used. The combination of these three preconditions is extremely important because it ensures that they are collectively agreed, they correspond to a genuine interest of the companies of the sector and they are not used as a means of undermining the competition in the industry or the collective autonomy of the social partners.⁵⁸⁶ A last limitation to these clauses was proposed by Rieble ⁵⁸⁷ and consists in the application of the principle of equality (*Gleichheitssatz*) to these clauses. The legitimacy of these clauses must obey a genuine interest of the sector and not be the source of competitive advantages of some undertakings that could use them in order to cut labour costs. This obliges the social partners to be very cautious as to the conditions in which these clauses may be used and companies to justify the use of these clauses. The social partners may lay out the possibilities of use

⁵⁸⁵ Baumann, T. (1992). Die delegation tariflicher rechtsetzungsbefugnisse, Dunker & Humblot.

⁵⁸⁶ Däubler, W., M. Kittner, et al., Eds. BetrVG mit Wahlordnung und EBR-Gesetz, Bund-Verlag, Henssler, M. (1994). "Flexibilisierung der Arbeitsmarktordnung." Zeitschrift für Arbeitsrecht: 487 ff.

⁵⁸⁷ Rieble, V. (2004b). "Öffnungsklauseln und Tarifverantwortung." Zeitschrift für Arbeitsrecht **35** (3): 405-429.

and companies must present evidence that they fulfil those conditions in order to be able to deviate from the collectively agreed standards. The combination of these elements ensures a wide degree of transparency and control in the application of those clauses.

The last question concerns the application of these clauses to non-affiliated employees. German collective bargaining is underpinned in the principle of double-affiliation, according to which the provisions of collective agreements are applicable only to affiliated employees in the absence of an administrative procedure of extension or an incorporation agreement contained in the employment contract (§3 and 5TVG). The problem lies in the following: the non-affiliated employees will be subject to a provision of the collective agreement (e.g: an increase in working time without an increase in pay) without being affiliated to the trade union. This problem may be overcome by means of the legitimacy of the works council. The application of the opening clauses contained in collective agreements must be made by means of an agreement with the works council. The trade unions and works councils have distinct sources of legitimacy to regulate the conditions of work; whereas the legitimacy of the unions arises from the affiliation of the employees, the legitimacy of the works councils arises from an election. Since all employees have the possibility of participating and influencing the results of the election of the works council and the works council represents all the employees of the undertaking, the decisions of the works council will equally bind the employees that are not affiliated to the union. This is a means to overcome the problem of the lack of legitimacy.⁵⁸⁸

This analysis of the use of flexibilisation agreements in Germany may allow us to extract some preliminary conclusions. The former predominance of the industry level agreement (*Flächentarifvertrag*) in Germany as a mandatory regulation of the industry by means of irrevocable minimum standards does not correspond to the current reality as the social partners have devised a number of techniques to develop a more company-friendly *Tarifpolitik*. This does not mean however that the industry agreement lost its predominance in the German industrial landscape; the *Flächentarifvertrag* remains the main source

⁵⁸⁸ Waas, B. (2007). Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives - Germany Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives. R. Blainpain, Kluwer: 17-41.

of law in the industrial level but with several possibilities of deviation that allow for the consideration of the interests of individual companies that face unique difficulties. These possibilities of deviation were surrounded by precautions so that they would not be used as a means of escape from industry agreements but as an answer to genuine problems. The main instruments of deviation are the *OT-Mitgliedschaft* clauses, the single-employer agreements and the opening clauses. The *OT-Mitgliedschaft* clauses are an ingenious device designed to encourage the affiliation of employers and avoid an escape from collective agreements. Since employers are affiliated to their correspondent associations and enjoy all the rights and duties except the duty to be bound by the collective agreement, the employers' organisation can hear them and take into account their interests in the *Tarifpolitik* and convince the trade union to sign single-employer agreements with them take correspond to their needs. These single-employer agreements (themselves an instrument of decentralisation) are equally subject to a double-control: they are subject to the control of the trade union (because unions are organised at the industry-level in Germany, therefore there is no free-riding on the sacrifices of other competing unions) and to the control of the employers' association, who supervises if its member has a genuine interest in a single-employer agreement and is not simply paying unfairly in the industry. The final instrument of decentralisation are the opening clauses. There are several types of opening clauses⁵⁸⁹ that correspond to several interests. The use of these opening clauses is subject to several controls: they must have limits to the possibility of deviation, so that the constitutionally protected collective autonomy is not endangered, they must be express (which ensures a consensus at the industry-level as to the possibilities of deviation), they must lay out the preconditions under which they may be used (in order to control their use and ensure that it corresponds to the genuine interest) and some say that they must abide by the principle of equality (so that the competition between the undertakings in the industry is not injured). Finally, the requirement that they be implemented by means of a decision of the works council ensures a wide degree of legitimacy to the decisions that is capable of overcoming the principle of double-affiliation. These possibilities of

⁵⁸⁹ Kittner, M. (1998). Öffnung des Flächentarifvertrags. Tarifautonomie für ein neues Jahrhundert - festschrift für Günther Schaub zum 65 Geburtstag. M. Schlachter, R. Ascheid and H.-W. Friedrich. München, C.H Beck: 389-420.

decentralisation are particularly important for the new competitive requirements that companies are subject to. They are extremely important in times of economic fluctuations and in companies that are heavily dependent of the orders of other companies (outsourcing companies) because they provide companies with a means of overcoming the economic hardships and avoiding redundancies and they flexibilise the organisation of work within companies in order to make them more responsive to the demands of their clients (who are their main stakeholders), thus ensuring the alignment of interests between employers and employees. The several controls that each one of these possibilities are subject to ensure that they correspond to genuine competitive and occupational interests and they are not merely a means of avoiding collective agreements. In this sense, they are an important instrument of flexibility and social dialogue.

(b) France – the French system of collective bargaining has equally had an extraordinary experience of decentralisation of collective bargaining by means of derogatory agreements up to the point that they completely inverted the system of collective bargaining and turned the focus towards the level of the company. The reforms implemented in France completely reversed the traditional system of collective bargaining by transforming company level agreements into the main source of regulation of labour relations and making the industry-level agreements subsidiary. Likewise in Germany however, this deep transformation of the system was surrounded with precautions so that the benefits of decentralization would not turn into a generalized escape from collective agreements and into a further weakening of the power of trade unions that could have severe consequences in a country where the trade union panorama is already considerably dispersed.

In order to understand the reforms implemented in 2004, which transformed company agreements into the main source of regulation of labour relations, one has to contextualise it into the evolution of the French system in general. The French system of collective bargaining was traditionally underpinned in the so-called *ordre publique sociale* or *principe de faveur*. This principle claimed that the higher sources of law prevailed upon the lower sources, which could only improve upon the conditions laid upon the higher sources. Therefore, the relationship between the sources was the following: the

law laid the minimum standards applicable to all the workers; this could improved upon by national collective agreements; national collective agreements (or the law in their absence) could be improved by industry level agreements and, finally, company-level agreements could only improve upon the remaining sources.⁵⁹⁰ This gradual increase in the level of protection afforded by this particular articulation between the distinct levels of collective bargaining was a pillar of the French system of industrial relations that had been built upon several reforms that took place in 1950, 1971 and 1982. The main idea was to ensure a wide level of representativity in the modifications introduced and to guarantee that the same minimum standards applied to all workers; in the event that the branch or the particular company were able and willing to afford higher standards, they were free to do so; if not, the minimum standards provided for in the higher level source prevailed and could not be derogated.

The first blow to this regime came in the Auroux Laws of 1982, which first put in question in a limited extent the relationships between the law and the industry agreement. While maintaining the basic rule that the higher level agreement (in particular the industry agreement, which shares the responsibility of being the main source of regulation of labour relations in France together with statutory law) should retain its natural tendency to regulate the industry agreement, the Auroux Laws opened a timid possibility of deviation in the subject of wages and in the management of working time as long as the derogation was made in accordance with the preconditions expressly laid out in the law. The Law of 13 November 1982 introduced the mandatory duty to bargain within companies and authorized the conclusion of company-level agreements derogating from higher-level agreements. In the subject of wages, the Auroux law authorized the company-agreement to provide for a particular modality of increase of the salaries in the company, more adequate to the concrete situation of the company, provided that the total increase is reached and the minimum salaries be respected (L132-24CTF); in addition, L212-10CTF authorized the company-agreement to determine a particular management of the working time in the company in deviation from the agreement within certain limits. The derogation was subject to an important

⁵⁹⁰ Mazeaud, A. (2006). Droit du Travail, Montchrestien, Pélissier, J., A. Supiot, et al. (2008). Droit du Travail, Dalloz.

limit however: the right of opposition of non-signatory trade unions. In the event that the shop-steward who signed the agreement was not a member of a representative trade union that opposed the agreement, this later trade union could exercise the right of opposition and contest the agreement in an industrial tribunal.⁵⁹¹

This important reform lay the seed for another important reform that took place in 1995. The national agreement of 1995 contained an appeal from the social partners to the Government to rethink the articulation between the distinct levels of bargaining; in the view of the social partners, whereas the industry agreement should maintain its traditional regulatory function, the focus of collective bargaining should clearly evolve towards the level of the company, which should become the main terrain of social dialogue. The industry level agreements should not only open room to collective bargaining at the company level, reserving to itself a regulatory role of the bargaining that took place at the lower levels, and to make provisions for companies where social dialogue did not reach without overburdening those where social dialogue is established. This call of the social partners did not find its way into the legislative reform of the labour market that took place in 1996 however and the traditional relationship between the levels remained.⁵⁹²

The adaptation agreements introduced by the Aubry laws of 1998 and 2000 introduced a further push to company-level bargaining as the adaptation to the shorter working week was made by means of an agreement with the employee representatives. This led the MEDEF to make a joint statement in 2001 calling for a dynamical articulation of the levels of bargaining that would provide more room to company-level bargaining. This provided the final push to the reform of collective bargaining that took place in 2004 that has completely *bouleversé* the panorama of collective bargaining and turned the focus towards the level of the company.

The reform of 2004 introduced two alinea to L.132/33 CTF that transformed the whole system. In accordance with the new version of the law,

⁵⁹¹ Verdier, J.-M. (1983). "La présence syndicale dans l'entreprise et la loi du 28 octobre 1982 relative au développement des institutions représentatives du personnel." *Droit Social*(1): 37-54, Moreau, M.-A. (2004). National Report France. *The Evolving Structure of Collective Bargaining in Europe*. S. Sciarra. Florence, European Commission, University of Florence.

⁵⁹² Coin, G. (1996). "L'accord interprofessionnel du 31 octobre 1995 sur la politique contractuelle." *Droit Social*(1): 3-11.

which migrated towards the new *Code du Travail Français*, the company level agreement is capable of derogating the industry level agreement (if necessary in a less advantageous direction) unless the industry level agreement expressly forbids it from doing so. This is an important transformation whose impact should not be underestimated! The *principe de faveur* that governed French labour law for more than 40 years was completely inverted and the focus of bargaining turned completely from the level of the industry towards the level of the company. Currently, the exception became the rule and almost all the provisions of collective agreements may be derogated unless the collective agreement itself does not allow it!⁵⁹³ This is even more important if we consider the meaning of the word “*derogation*”, which does not mean only deviation in a less favourable way but equally adaptation and innovation. A third extremely important innovation consisted in the assimilation of company agreements to collective agreements in the adaptation of the standards laid down in the law. The law has long allowed industry agreements to make an implementation of the provisions contained in it in order to allow the social partners to conform better the statutory solutions to the particular conditions of the industry. The reform of 2004 empowered company agreements to undertake that same adaptation, which is bound to have very important consequences as regards the use of flexible work contracts and the management of working time because the law made some very important concessions to the social partners in this respect. As regards the use of flexible work contracts, the law allows the social partners some margin of manoeuvre in the determination of the conditions in which they may be concluded and their duration; since the law may now be implemented by means of a company agreement unless the industry agreement expressly forbids any deviation, this provides companies with a considerable margin of manoeuvre in their human resources. The same thing goes for the management of working time, which is increasingly lowering from the industry level – which merely lays down the general guidelines supplementary applicable – towards the level of the company, providing companies with an extremely important instrument of competitiveness and adaptation to the requirements of clients, who are their main stakeholders.

⁵⁹³ The exceptions are minimum wages, professional classifications, mutual insurance funds and professional training funds (L.2252-1 CTF).

Finally, as regards wages, the Code du Travail maintained the previous rule introduced by the Auroux laws that provided that the company-level actors could agree on the increase in wages as long as the global increase was respected.⁵⁹⁴

This profound transformation of the *principe de faveur* that prevailed for so long in French labour relations was subject to the scrutiny of the *Conseil Constitutionnel*; the French constitutional watchdog boldly stated that the *principe de faveur* should be considered as a fundamental principle of labour law at the light of the French Constitution; nevertheless, its precise content and reach should be determined by the lawmaker. This in fact meant that the *principe de faveur* had a statutory and not constitutional value and that the lawmaker was simply obliged to determine the conditions and the extent to which the statutory law could be derogated. As regards the possibility of deviation of the law by company level agreements, the *Conseil* was satisfied with the introduction of the majoritarian principle in French companies, which would ensure to a sufficient extent the safeguard of the interests of the employees in collective bargaining.⁵⁹⁵

As we may observe, the reform of French labour laws in 2004 was deep as the centre of collective bargaining was in fact displaced from the industry level towards the level of the company, with the industry level becoming subsidiary in relation to the level of the company. This was surrounded with several precautions however so that the bargaining at the level of the company would correspond to a genuine need of the companies and not become a means of evading collective agreements. The control was made by means of the introduction of the majoritarian principle (*principe majoritaire*) that was already briefly analysed above on occasion of the analysis of the evolution of the actors. The majoritarian principle concerned the competence to sign these agreements. The scheme goes as follows: the competence to sign the

⁵⁹⁴ Souriac, M.-A. (2004). "L'articulation des niveaux de négociation." *Droit Social*(6): 579-590, Julliot, S. (2005). Les turbulences au sein du double canal de représentation en France. *Recomposition des systèmes de représentation des salariés en Europe*. S. Laulom, Publications de l'Université de Saint-Étienne, Mouret, J. (2007). Collective Relations in France: a multi-layered system in mutation. *Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives*. R. Blainpain, Kluwer: 41-65.

⁵⁹⁵ See decision of the *Conseil Constitutionnel* 2004-494 of the 29th April 2004. Pélissier, J., A. Supiot, et al. (2008). *Droit du Travail*, Dalloz.

agreements belongs, as a matter of principle to shop stewards; here one has to make a distinction: if the shop-stewards belong to a representative union, then there are no further requirements; if the shop-steward belongs to a non-representative union, then the agreement is subject to the right of opposition of the majoritarian unions. In the event that no shop-steward exists in the company, the agreement may be concluded by a staff-delegate but is subject to a further validation by a paritary commission at the level of the industry. If no shop-steward exists, the agreement may be concluded by an employee enjoying a mandate from a representative trade union but under the condition that the agreement be subject to the approval of the employees of the company by means of a referendum. This complex legal network has a number of important advantages: firstly, it ensures the participation of representative trade unions by means of their priority in the signature of the agreements or their control by means of the right of opposition of the need of approval in the commission. Secondly, the control is equally exercised by the employees of the company because the competence to sign the agreements in the absence of a shop-steward belongs to a staff-delegate (thus ensuring the representativity of the employees) or to a mandated employee and subject to a referendum; this guarantees the control and participation of the employees and prevents the use of the company-level agreements as a means of undermining the industry agreements, which maintain their role as the main source of law at the industry level.⁵⁹⁶

This use of flexibilisation agreements in France must be connected to the reform of representativity of the trade unions implemented in 2008. Before the reform undertaken by the law of 20th August 2008, French law distinguished between presumed representativity and proven representativity: certain organisations declared as representative in an administrative act dated from 1966 were presumed *de jure* to be representative; the other organisations enjoyed a so-called self-representation and had the burden of proof of its representativity in the event that they were contested. The law of 2008 modified this state of affairs to a great extent: the reform eliminated the distinction between presumed and proven representativity and subjected all trade unions

⁵⁹⁶ Ray, J.-E. (2004). "Les curieux accords dits "majoritaires" de la loi du 4 mai 2004 " Droit Social(6): 590-600.

to the proof of representativity in accordance with some (stringent) criteria in the level in which they wished to act. This is expected to reduce trade union dispersion in France. The impact of these reforms may be the following: the use of these agreements at the level of the company will be subject to stringer new criteria of representativity, which is expected to reinforce social dialogue at the level of the company by increasing the legitimacy of the actors.⁵⁹⁷

This short description of the evolution of French collective bargaining demonstrates that the French system appears to be evolving towards a more decentralised level of bargaining with the company-level bargaining increasingly taking the central place in social dialogue and leaving industry level bargaining with a subsidiary role. The main determinants of the reforms were the same as the ones laid out in Germany: industry level agreements and statutory law were deemed to be too inflexible as regards the competitive demands of companies and company-level bargaining was seen as the most appropriate means of adaptation of companies to the demands of shareholders and stakeholders. The national agreement of 1995 and the joint position of the MEDEF in 2001 suffice to prove that the decentralisation of collective bargaining is not merely a requirement of the employers, who could use it as a means of escape from social dialogue, but equally of the social partners, who understood that the distinct pressures to which companies are subject nowadays demand distinct solutions in terms that the main focus of social dialogue should become the company-level. The prevention of the undermining of collective agreements led the social partners to be extremely cautious as regards the conditions under which these deviations could be implemented. These precautions took two concrete measures: firstly, the social partners reserved themselves the right to conventionally reduce the possibility of deviation by considering the industry level agreement of such a paramount importance that no derogation is justifiable; secondly, the actors at the level of the company who were deemed competent to sign those agreements were subject to the control of the trade unions. The rules concerning the competence to sign those agreements were already laid out above and will not be repeated here; it is sufficient to say that the law subjects the conclusion of those

⁵⁹⁷ Dockés, E. (2008). Doit du Travail Dalloz, Pélissier, J., A. Supiot, et al. (2008). Droit du Travail, Dalloz, Favennec-Héry, F. (2009). "La représentativité syndicale." Droit Social(6): 630-640.

agreements to a number of controls by the trade unions in order to ensure that the deviation corresponds to the genuine interests of the company.⁵⁹⁸ One last word may be said as regards the subject-matters of these agreements; the majority of these agreements concern the issues that are of paramount importance to the companies – wages and working time. The provision of companies with a possibility of controlled management and flexibility in these subjects is extremely important in a world in which companies must be increasingly flexible in order to cope effectively with economic fluctuations, the unstable demands of shareholders and stakeholders and harsh competition from countries in which the labour standards are considerably lower. The possibilities of controlled decentralisation by means of flexible agreements should not be seen as a measure of downgrading workers' rights in the name of competitiveness but as a means of maintaining the occupational levels in the company and ensuring the alignment of interests between managers and employees (who are interested in the survival of the company because their jobs simply depends on it). This procedure for alignment is surrounded with precautions to avoid unfair competition. The final result appears to be an extremely balanced solution that conciliates the need for flexibility and the protection of the workforce by means of company-level social dialogue.⁵⁹⁹

(c) UK – the UK has also exhibited some experience with flexibilisation agreements destined to conform the labour standards to the concrete situation of the undertaking. Unlike in the other countries however, the use of flexibilisation agreements was not inserted into collective agreements but within the law. The reason for this particularity in relation to the continental experience was due to the rule of voluntarism that prevails in the UK, which reduces

⁵⁹⁸ For a good overview of the reform, see Souriac, M.-A. (2009). "Les réformes de la négociation collective " *Revue de Droit du Travail*(1): 14-23.

⁵⁹⁹ There are doubts as regards the actual impact of the reform because the figures concerning the use of these instruments reveal that they have seldom been used and that industry level bargaining is seen as adequate to the competitive demands of companies. Despite this, many doubt the reasonableness of making impact assessments at such an early stage because the insufficient publicity of the legal mechanisms, the doubts as regards their implementation and the short time that has passed since the enactment of the reforms may have compromised the results; social dialogue is essentially a cultural factor and culture takes time to change. See Combexelle, J.-D. (2008). "Loi du 4 mai 2004: quel bilan? Quelles perspectives?" *Droit Social* (1): 20-23. Ray, J.-E. (2008). "Quel droit pour la négociation collective de demain?" *Droit Social* (1): 3-15.

collective agreements to the status of gentleman's agreements. Since collective agreements were not binding, the employer was free to deviate from them (although he could suffer industrial action by the recognised union) or to renegotiate the terms and conditions of employment contained in collective agreements unconstrained by the rule *pacta sunt servanda*. The influence of EU Law was equally overwhelming in this particular subject because the statutes that allowed for derogation by means of an agreement with the workforce were the ones used to implement EC Directives on several labour standards. The UK decided that the margin of manoeuvre contained in those directives should not be used by the trade unions but by means of an agreement with the workforce. This created a revolution in UK Law – the workforce agreements – and opened the doors to a particular dual channel system. The purpose of this section is to analyse the statutory bargained adjustments – the agreements directly concluded with the workforce designed to deviate from the statutory standards.

The use of flexibilisation agreements in the UK must be contextualised in the use of workforce agreements. The analysis of the evolution of the actors in collective bargaining laid out above attempted to demonstrate that the British system seems to be currently evolving into a dual-channel system due to the introduction of directly elected representative works-council type bodies within companies that have a number of competences namely in information and consultation procedures in situations of collective redundancies and transfer of undertakings and the adaptation of certain labour standards to the concrete situation of the undertaking. The statutory bargained adjustments consist in a modality of these workforce agreements. They allow directly elected employee representatives or, in certain circumstances, a majority of the employees to agree with the employer to deviate from the standards laid down in the law applicable by default to all the companies and adapt them to the concrete situation of the undertaking. They were designed to overcome the absence of recognition of trade unions within the undertaking and provide the employees directly concerned with a voice in the workplace. There were two generations of these agreements: the first generation was provided for in British legislation and the derogation was subject to the ministerial approval because the statute required that the adaptation agreement provided for a measure of protection at least equivalent to the legal regime that it intended to substitute; the second

generation of these agreements arose from the implementation of EC Law in the UK – the Working Time Directive of 1993, the Parental Leave Directive of 1996 and the Fixed Term Work Directive of 1999. Unlike the first generation agreements however, these second generation agreements are not subject to a ministerial approval. In order to understand the function and reach of these agreements, it is worth analysing each one of them in detail.⁶⁰⁰

The subject of working time is one possible application of these workforce agreements. The transposition of the Working Time Directive into the UK marked a turning point in the regulation of the basic terms and conditions of employment in the UK because it was the first time in which working time controls were put in place to cover the entire population in general (whereas previously each sector and occupation had its own statute). The most important innovation brought about by the Working Time Regulations of 1998 however consisted in the possibility of deviation by means of a workforce agreement. Considering that the Working Time Directive allowed considerable scope for derogation by means of lawmakers or the social partners⁶⁰¹ and much of the responsibility for arriving at more precise standards was delegated to the lower level, which included both collective agreements and individual agreements. The devolution is unusual in UK law and in particular its implementation. The central concept of the directive is one of “*relevant agreement*”, which means both a collective agreement applicable to the worker by means of an incorporation clause or a workforce agreement concluded between employee representatives and the employer or any other agreement in writing that is applicable between the employer and the employee. The workforce agreement is concluded with specified representatives of the workforce concerned or the majority of the workforce itself as long as the workers concerned are not covered by the terms and conditions laid out in a collective agreement concluded with a recognised union. The agreement may also be concluded with a “*particular group*” of workers, meaning “*a group of the relevant members*

⁶⁰⁰ Davies, P. L. and C. Kilpatrick (2004). "UK Worker Representation after the Single Channel." *Industrial Law Journal* **33**(2): 121-151.

⁶⁰¹ Didry, C. and A. Mias (2004). Au-delà des politiques de l'emploi: le temps de travail à la recherche d'une représentation européenne des travailleurs. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint Etienne.

*of the workforce who undertake a particular function, work at a particular workplace or belong to a particular department or unit within the company”.*⁶⁰²

The parental leave is another area in which the British statute allows derogations by means of workforce agreements. The implementation into the UK of the Parental Leave Directive was made by means of the specific sections of the Employment Relations Act 1999. The regulations provide that the operation of the parental leave schemes are to be worked out by an agreement between employers and employees; in the event that no agreement is made, a default scheme operates. This appears to provide room for the leave to be taken in blocks or in multiples of one week, depending of the result of the bargaining. The displacement of the provisions of the default scheme is to be implemented by means of a collective agreement or a workforce agreement governing the operation of the parental leave; in addition, the terms of the collective agreement or the workforce agreement must be incorporated into the employment contracts of the employee, thus ensuring that the conventional scheme is truly mandatory for the employer. The conclusion of the collective agreement is subject to additional preconditions: it may be concluded only in the absence of a collective agreement concluded with a recognised independent trade union; it may cover the whole workforce or only a part of it but it must be concluded with their representatives or the majority of the employees of the workforce or the part of the workforce concerned.⁶⁰³

The Law finally allows employers to conclude with the employees workforce agreements governing the use of successive fixed-term work contracts. The Framework Directive on fixed term work allowed the social partners to choose between a number of possibilities to avoid the abuse of fixed term work contracts. The Directive was transposed by the Fixed-Term Employees Regulations 2002, which provided the individual companies with a wide margin of manoeuvre in the implementation of the requirements of the Directive. The Regulations provide that the employer may agree with the employee representatives or with the majority of the workforce concerned (which may be the entire rank and file or merely an autonomous section)

⁶⁰² Deakin, S., William S. Morris (2005). *Labour Law*. Oxford, Hart Publisher. Collins, H., K. D. Ewing, et al. (2005). *Labour Law: texts and materials*, Oxford.

⁶⁰³ Collins, H., K. D. Ewing, et al. (2005). *Labour Law: texts and materials*, Oxford, Deakin, S., William S. Morris (2005). *Labour Law*. Oxford, Hart Publisher.

limitations in the use of fixed-term contracts. The employer may only sign the agreement if the matter is not dealt with previously with a recognised independent union in relation to the concrete bargaining unit.⁶⁰⁴

This short analysis of the use of flexibilisation agreements in the UK may allow us to extract some preliminary conclusions. The first conclusion consists in the recognition of the fact that the British system of industrial relations seems to be undergoing a process of evolution towards the creation of a hybrid dualist system of industrial relations with social dialogue at the level of the company by means of directly elected employee representatives or directly with the employees themselves. This is particularly important in small and medium sized companies where trade union implementation by means of shop-stewards is insufficient and there was a great lack of social dialogue. This raises the issue analysed above of the relationship between these bodies and the monistic system of industrial relations; the conclusion seems to be that they may only take place in the absence of union presence; when the issue is dealt with in a collective agreement, then the collective agreement will take precedence. A second conclusion concerns the impact of EC Law; it is curious that the British legislator implemented these provisions precisely in the transposition of EC Law, which adds up to the conclusion presented above that EC Law seems to lie on a dualistic system of representation that goes beyond the Directives on Employee Representation; this is another example of the influence of EC Law in an individual jurisdiction. The final conclusion concerns the modifications implemented: it is interesting to observe that the British legislator chose the technique of workforce agreements to implement these Directives. These workforce agreements provide the company with a considerable margin of manoeuvre of its human resources, in issues such as working time, parental leave and the use of flexible employment contracts. These instruments of flexibility in human resource management and the instrument of social dialogue as a means to implement it provides companies with sufficient flexibility in its organisation and reinforces its competitiveness in the market without undermining employee rights. The safeguard of employee interests lies in the fallback provisions and in the priority recognised to

⁶⁰⁴ Collins, H., K. D. Ewing, et al. (2005). Labour Law: texts and materials, Oxford, Deakin, S., William S. Morris (2005). Labour Law. Oxford, Hart Publisher.

collective bargaining: in the event that the agreements do not sufficiently guarantee employee interests, the employees or their representatives may simply refuse the agreement and the statutory rights will apply correspondingly; if the statute does not correspond to the interests of the company and the employer is in need of flexibility, he may agree to recognise a union and bargain with the unit directly. The combination of these provisions provides companies with sufficient flexibility in the application of labour standards while safeguarding the interests of the workforce by means of the requirement of social dialogue (either with the employees or with the trade unions) to implement those provisions.

(d) Portugal – Portugal has equally exhibited some trends towards the flexibilisation of collective agreements, particularly after the enactment of the Labour Code in 2003, which undertook a deep reform of the Portuguese labour market. The purpose of the instruments of flexibilisation are the same as occurred in the previous jurisdictions; to render companies more flexible and adaptive to the fluctuating demands of the market and shareholders and to align interests between managers and employees. The transformation was not so profound as the ones that are currently occurring in Germany and France; despite this, they are unequivocal and they may be the seed of a new decentralised culture of collective bargaining in Portugal.

The first transformation consisted in the end of the *principe de faveur* in Portuguese labour law. As a preliminary word, one must say that the *principe de faveur* never had such an extensive reach in Portugal as it had in France, since it was only applicable in the relationships between the law and collective agreement. The previous statute that was enforced in Portugal from 1969 to 2003 determined that the law laid minima that could only be improved upon by collective agreements unless the law stated otherwise; in this latter situation, the law could either determine that it allowed no derogation whatsoever (the so-called absolutely imperative norms) or, more seldom, that it allowed less favourable derogations. As regards the conflict between collective agreements, the law determined that the collective agreement that was closer to the concrete situation of the individual company prevailed. This meant that single-employer agreements would always take precedence over industry and national agreements even if they laid down less favourable principles. The

bottom line limit was the law that laid the minima under which no derogations were allowed.⁶⁰⁵ This in reality curtailed the margin of manoeuvre for collective bargaining in Portugal because the statutory regulation of the labour market was so extensive by means of a diffusion of statutes that attempted to regulate to its fullest extent each specificity of the labour relation that collective autonomy was left without any room for bargaining. This led to a paralysis of collective bargaining: collective agreements merely performed an informative function of the statutory regulation, replicating the statute and making it public in the company in an accessible way, and refrained to determining wages and professional careers for the sector. One exception was the extremely large public companies or private companies that enjoyed a legal monopoly; these companies usually concluded single-employer agreements but the content of the agreements were the same.

The first great stroke to this scheme came in 2003 with the approval of the Labour Code. The Portuguese Labour Code (in its version of 2003) determined in its art.4 that the collective agreements could freely derogate the law unless the law stated otherwise. This innovation opened room to collective bargaining because it partially freed the social partners from the constraints of the law and allowed them more room for manoeuvre. This movement led to a doctrinal division of the labour rules in three types of rules: (a) absolutely imperative norms (that could not be derogated either way); (b) relatively imperative norms (that could be derogated in a more favourable direction) and (c) suppletive norms (that could be derogated either in a more favourable or unfavourable direction). The Labour Code provided in its art.3CTP that, as a rule of thumb, legal rules were presumed suppletive and that it was a task of the legislator and the courts to determine which norms escaped from this presumption of derogability and could not be changed anyway or only in a more favourable way. This meant that, in reality, the *principe de faveur* ended and that legal rules and collective agreements became interchangeable. This reform of the relationship between law and collective agreements was coupled with some reforms on the conditions of validity of collective agreements that were extremely detrimental for the collective agreements that were in force and

⁶⁰⁵ Monteiro Fernandes, A. (2004). Direito do Trabalho, Almedina, Romano Martinez, P. (2008). Direito do Trabalho, Almedina.

in reality obliged the parties to the collective agreement to engage in bargaining so that the collective bargaining panorama in Portugal was renovated.⁶⁰⁶ The objective of the reform was clear: the statutory regulation of the Labour market had been suffering increasing attacks on account of criticisms of inflexibility, overregulation and disregard of the specificities of each sector. The social partners claimed that their hands were tied on account of the short margin of manoeuvre opened by the law and the escape from the labour regulation was overwhelming, particularly in some sectors characterised by a multitude of small companies in which the labour inspection is extremely difficult. The adoption of art.4CTP intended to overcome these difficulties by means of the introduction of concession bargaining in Portugal: the purpose of the regulation was to provide the social partners with a margin of manoeuvre in the determination of the working conditions, even in a less favourable way if necessary, in exchange for job security or other safeguards of employment. The understanding of the reach of the provision must be coupled with the rules governing the conflict between collective agreements: it is perfectly possible that an individual employer agree on a single-employer agreement with the competent trade union in deviation from the rules laid down in the higher level agreement or the law as long as the trade union recognises the legitimacy of the request of the employer and it finds such derogation necessary for the interest of the employees. This provision was reformed in the revision of the Labour Code that took place in 2008, although its reach was not modified. The provision (which now became art.3CTP) simply had a supplementary alinea that determined the norms that could only be derogated in a more favourable direction. This is simply a more accurate precision however to lay aside any

⁶⁰⁶ The provisions in cause were destined to lead to the expiry of the existing collective agreements (which had been enforced for more than 30 years, limiting the revisions to annual wage bargaining) and force the social partners to engage in new bargaining procedures and make use of the possibility offered by art.4CTP, so that the trade unions would not lay back on the existing collective agreements. This policy option was heavily criticized because one thing is to open room for bargaining and another is to force the partners to bargain in conditions of economical crisis, which left the unions in a delicate situation. See Gomes, J. V. (2004). National Report Portugal. The evolving structure of collective bargaining in Europe 1990-2004. S. Sciarra. Florence, European Commission, University of Florence, Gonçalves da Silva, L. (2004). Princípios gerais da contratação colectiva no Código do Trabalho. Estudos de Direito do Trabalho, Almedina. I: 167 ff.

doubts that arose in the legal thinking and case law; the main principle of the introduction of concession bargaining remained.⁶⁰⁷

The introduction of this rule of concession bargaining gave rise to one particular doubt of a constitutional nature that will be briefly laid out here. The question concerns the compatibility of this solution with the widespread use of administrative procedures for extension of collective agreements. Portugal follows the principle of double-affiliation in collective bargaining meaning that collective agreements are applicable only to the employees affiliated to the trade unions that signed the agreement. Although the rates of affiliation are low (circa 25% including the public sector) the coverage of collective bargaining reaches 80% thanks to the widespread use of the administrative procedures for extension.⁶⁰⁸ During the time in which the collective agreements could only improve upon the minima laid down in the law, there was no problem with this as it always benefited employees. Currently, the combination of the possibility of deviation *in pejus* with the use of the administrative procedure for extension raises the issue of the extension of derogatory norms to non-affiliated employees. The reality is that non-affiliated employees, who voluntarily chose not to join a union, will be subject by administrative means to the result of the bargaining. The legal thinking has been questioning the constitutionality of this possibility at the light of the constitutionally protected freedom of association in its negative dimension (art.55CRP). The Constitutional Court has not issued a decision and the doubt remains.⁶⁰⁹

The Labour Code also provides for other modalities of flexibilisation agreements. The reform of the Labour Code that took place in 2008 was extremely innovative in this aspect as it introduced a number of possibilities of flexibilisation of working time within the company by means of an agreement with the employees. The main modifications introduced consisted in the regime of group adaptability (*adaptabilidade grupal* – art.206CTP), working time accounts (*bancos de horas* – art.208CTP) and concentrated working time

⁶⁰⁷ Gomes, J. V. (2004). National Report Portugal. The evolving structure of collective bargaining in Europe 1990-2004. S. Sciarra. Florence, European Commission, University of Florence, Lobo Xavier, B. (2004). Curso de Direito do Trabalho, Verbo, Monteiro Fernandes, A. (2004). Direito do Trabalho, Almedina.

⁶⁰⁸ Source: EIRO -> <http://www.eurofound.europa.eu/eiro/2002/12/study/tn0212102s.htm>

⁶⁰⁹ Gomes, J. V. (2007). Direito do Trabalho - relações individuais. Porto, Coimbra.

(*horário concentrado* – art.209CTP). As a preliminary word, one must say that these situations of flexibisation of working time consist in distinct modalities of application of the general regime of adaptability of working time. Art.204CTP provides that, in deviation to the standard regime of 8 hours per day and 40h per week of working time, the social partners may agree to organise working time in average terms by means of a collective agreement. The modalities of application of this flexible working time are the following. The social partners may agree to determine a regime of group adaptability (art.206CTP); the regime of group adaptability consists in a modality of flexible working time applicable to a certain economic unit in which the employees voluntarily choose to be subject to the average working time by means of an agreement with the employer; the agreement is valid only if: (a) at least 60% of the employees of the economic unit affected by the collective agreement are affiliated to the union that signed it and they choose to have their employment contract governed by that collective agreement or (b) if at least 75% of the employees affected by the agree to have their employment contracts subject to that regime. It is worth noting that Portuguese Law allows in art.205CTP that the employer and the employee agree individually to determine their normal working time in average terms; if 75% of the employees in an economic unit individually agree to have their normal working time determined in such terms then the regime will be applicable to the remaining 25% of the employees of the unit independently of agreement. This is an important innovation whose impact should not be underestimated. This is a regime that allows for the application of a standard regime of working time to all the workers of a certain economic unit based upon sufficient support of the measure. It is a kind of referendum provided for in French law for the approval of the derogatory agreements concluded by mandated employees. A distinct modality of flexibilisation agreement consists in the working time accounts (art.208CTP). These working time accounts consist in a specific modality of organisation of working time in which the social partners are given a choice as to the type of compensation for the deviation of the normal working time. Art.208CTP states that the social partners may agree on increasing the normal working time for a maximum of 4 hours per day, 60h per week and 200h per year; the social partners may then agree on determining the type of compensation for the deviation from the normal working time, which may consist in (1) monetary compensation, (2)

correspondent reduction of normal working time or (3) both! The final modality of flexibilisation of working time consists in the concentrated working time (art. 209CTP). This may be implemented either by a collective agreement or by an individual agreement between the employer and the employee; in this case, the normal working time may be increased in a maximum of 4 hours per day so that the worker performs work for a maximum of 4 days per week and three days off or a maximum of three consecutive days.

These types of agreements are of paramount importance in the Portuguese entrepreneurial landscape. The majority of Portuguese companies are small companies that work as outsourcing companies to major contractors located abroad; since the majority of these contractors have irregular orders and are exposed to a number of uncertainties caused by the economic cycles and shareholder pressure, among other elements, the Portuguese outsourcing companies have to be extremely flexible and responsive in order to maintain their customers. The previous regulation of working time was very ineffective because, despite the attempts of flexibilisation by means of collective agreements, they were deemed inadequate to the unique pressures placed upon each company and therefore created incentives to escape labour regulation; the “*black labour market*”, i.e: undeclared work and falsified working time documents, were a social stigma because the fear to loose employment left employees without any kind of protection. This solution attempts to strike a balance between the need for flexibility and the need of social protection; the need for flexibility is evident in the enlargement of the possibilities of deviation by means of an individual and group agreement of the employer with its own employees; the social protection dimension is patent in the need for authorisation in collective agreements (unless the law allows room for the individual agreement) and in the attempt to control the use of this possibilities of flexibilisation by discouraging the escape from the labour regulation. Even the few large Portuguese companies have an interest in this type of flexibilisation because the international competitive pressures that they are

exposed to for them to be more adaptable in their business operations. This is particularly the case in construction companies.⁶¹⁰

This short description of the use of flexibilisation agreements in Portuguese law reveals that the Portuguese legislator has taken some limited but courageous steps towards the decentralisation of collective bargaining in Portugal and the use of instruments of flexibility in order to make companies more competitive. The end of the *principe de faveur* in the relationship between law and collective agreements in Portugal and the liberation of the social partners from the limits placed by a heavy statutory regulation of the labour market opened the doors to the introduction of concession bargaining in Portugal. The idea underpinning the reform of the relationship between laws and collective agreements was to encourage social dialogue between employers and trade unions and engage the social partners in assuming more responsibility for the regulation of the labour market both at the industry and at the single-employer levels (because single-employer agreements may also deviate from the law and prevail over industry agreements in case of conflict). The requirement that this deviation be contained in a collective agreement (because unions have the monopoly of collective bargaining in Portugal) ensured the participation of the social partners (in particular the trade unions) in the process and guaranteed that this flexibility would correspond to a genuine interest of the workforce and would not end in an escape from labour regulation. Another extremely important innovation consisted in the possibilities for an ad hoc determination of working time by means of an agreement with the employees. The types of flexibilisation agreements and the conditions for their implementation were already laid out above and will not be repeated here. It suffices to say that those possibilities depend of the agreement of the employees concerned (in one situation by means of a referendum) and often by means of a provision in a collective agreement that authorises the employer to implement those measures. This ensures the protection of the employees in the implementation of those measures and provides companies with an extremely important instrument of flexibilisation of working time that will allow

⁶¹⁰ See the studies on the Portuguese company fauna and the explanatory notes on the proposals for the reform of the Labour Code issued by the Portuguese Ministry of Labour. Ministério do Trabalho e da Solidariedade Social (2006). Livro Verde sobre as Relações Laborais. Social, M. d. T. e. d. S. (2008). Livro Branco sobre as Relações Laborais.

them to become more competitive by becoming more responsive to the requirements of shareholders, stakeholders and economic fluctuations.

(e) conclusion - this analysis of the development of flexibilisation agreements in each one of the jurisdictions under study presents the following conclusions. The first relevant conclusion appears to be the fact that each one of the jurisdictions under study exhibits attempts to flexibilise the collectively agreed terms and conditions of employment in their internal systems of industrial relations. This flexibilisation focuses mainly (but not exclusively) in the subjects of wages and working time and are concluded essentially between the managers of the company and the employees directly concerned. The trade unions have understood the need for these agreements but they fear that they may pose a threat to their traditional function of defending the interests of employees because flexibilisation agreements are capable of undermining their power; therefore the conclusion of these agreements is usually surrounded with precautions in order to attempt to ensure that they are not used as an instrument of predominance of the employer and as a means of undermining the protection afforded by collective agreements and statutes. These are the main characteristics of these agreements: (a) flexibilisation, (b) essentially in the subjects of wages and working time and (c) subjection to control mechanisms. Since these agreements assume a variety of forms even within the same system, they must be analysed within their due context.

Germany has been experiencing in the last 30 years a considerable growth of these flexibilisation agreements. These agreements came in the form of (a) “*naked membership*” agreements, (b) single-employer agreements and (c) opening clauses. “*Naked membership*” agreements consist in agreements that attempt to encourage the affiliation of employers by exempting them from the duty to abide by the collective agreement concluded by the employers’ association. These agreements are seen as an optimal alternative to the general escape from affiliation to employers’ associations because the exemption from the duty to abide by the agreements allows the association to understand the reasons why the existing collective agreements are inadequate to the situation of the concrete employers and attempt to design a *Tarifpolitik* that also takes into account the needs of those employers in future collective agreements or to encourage the conclusion of a single-employer agreement

that will be more adequate to the concrete situation of the employer. This is a good solution because it brings employers into collective bargaining, ensures that the reasons underpinning their refusal to sign collective agreements are justified and adapts the collective bargaining to the concrete situation of the employer. Single employer agreements are equally used as an instrument of decentralisation because it allows employers to adapt the collectively agreed terms and conditions of employment to the situation of their company. The control mechanisms consist in the requirement of the agreement of a trade union; in the event that the trade union believes that the reasons invoked by the employer are not justified, then it may refuse to sign the single employer agreement and undertake industrial action to force the adherence to the industry agreement. The final instrument of decentralisation are opening clauses: these consist in clauses inserted in collective agreements that allow for the deviation at the level of the company from the standards laid down at the level of the industry by means of an agreement with the employees concerned. There are several types of these clauses (framework regulations, optional regulations and opening clauses properly said) and they focus mainly on working time and pay. They are subject to a number of requirements of legitimacy in order to function as a control mechanism in their application (the most commonly accepted are legal security, legal certainty and equality) and their application to non-affiliated employees is based in the democratic legitimacy of the works council.

France has equally been experiencing a considerable use of flexibilisation agreements in its internal system of industrial relations. The cardinal points of the introduction of these agreements consists in (a) the Auroux Laws, (b) the Aubry Laws and (c) the reform of 2004. The Auroux Laws were an extremely influential reform of Labour Law in France that introduced the duty to bargain with employee representatives within the company. The Auroux laws introduced in this duty to bargain the subjects of wages and the adaptation of the standards of working time laid down at the level of the industry to the concrete situation of the company. This was the first concrete experience with company level bargaining in France in the subjects that concern the interests of the employees to the foremost extent: wages and working time. The success of the reform was continued with the Aubry laws of 1998 and 2000 that introduced the 35 hour working week in France. The legislator opted for a bargained solution for the problem as the implementation

of the 35h week should be made by means of an agreement with the employee representatives. The reform of 2004 was the final point in this movement of decentralisation as the lawmaker intended to displace the focus of collective bargaining towards the level of the company. The industry agreements became subsidiary except where the law or the collective agreement expressly forbid the possibility of derogation. There were considerable limits however to prevent that this possibility of derogation would be used as a means of undermining the collectively agreed terms and conditions of employment laid down in the industry agreements. The limit consisted fundamentally in the persons competent to bargain the derogatory agreements: the law admitted the conclusion of these derogatory agreements to a very large extent by (1) shop-stewards and, in the absence of shop-stewards, (2) staff-delegates and subject to the approval in a paritary commission or (3) specially elected representatives expressly mandated by the trade unions and subject to the approval by a referendum. This ensures the participation of trade unions in the process of decentralisation as a control mechanism in order to ensure that the use of the derogatory agreements corresponds to a genuine interest of the company and is not used as a means of undermining the collectively agreed terms and conditions of employment.

The UK has equally experienced the use of flexibilisation agreements. There is one striking distinction in relation to the former types of agreements however: since collective agreements are not mandatory in the UK, these agreements refer to the statutorily provided terms and conditions of employment. Some statutes allow for the adaptation of their terms and conditions of employment at the level of the company by means of an undetermined concept in British law named as "*workforce agreements*". The legal thinking has tended to name them as "*statutorily bargained adjustments*". British law recognises statutorily bargained adjustments in the subjects of working time, parental leave and the use of fixed term work contracts. These statutes and agreements result from the transposition of EU Directive into British law and the possibilities of deviation are thought to be able to adapt them to the particularities of British companies. These agreements were subject to considerable control mechanisms however: in the event that the agreement does not sufficiently safeguard the interests of the employees, then the employees may refuse the agreement and the statutory provisions apply; if

the employer is in need of flexibility and no agreement is reached with the rank and file, he may attempt to reach an agreement with the trade unions in order to adapt the conditions by means of a collective agreement. This ensures an effective control to the possibilities of deviation.

The final jurisdiction that has been implementing these agreements consists in Portugal. Likewise in France, flexibilisation agreements in Portugal were introduced by statutory reform and consist in the possibility of flexibilising the adaptation of the statutory standards to the concrete situation of the industry or company. The first extremely important reform consisted in the end of the *principe de faveur* in Portuguese law: currently, statutory law is subsidiary to collective agreements except where the law expressly forbids the possibilities of deviation. This provides the trade unions with considerable instruments to adapt the statutory standards to the concrete situation of the industry or company by means of collective agreements. The second type of reform consisted in the possibility to flexibilise working time in Portuguese companies by means of *group adaptability*, *working time accounts* and *concentrated working time*. The implementation of these provisions is surrounded with precautions that ensures the participation of trade unions (such as the requirement of a collective agreement in order to implement them in the company) and the agreement of the employees concerned. This attempts to ensure that flexibilisation is not synonymous with precarity or the undermining of terms and conditions of employment and correspond to genuine occupational requirements.

Therefore, flexibilisation agreements correspond to a new modality of adaptation of the collectively agreed terms and conditions of employment to the situation of individual companies. These agreements have been progressively developed since the 1980s and are intended to ensure the capacity of companies to adapt to unstable circumstances. They allow the management and the workforce to readapt their labour costs and productive organisation to the demands of customers, economic fluctuations and pressure from the shareholders. Since the main concern of companies consists in labour costs and the organisation of production, these agreements focus mainly - but not exclusively - in the subjects of wages and working time. These agreements may pose a threat to the collectively agreed terms and conditions of employment because they may be an escape route from the collective

agreements. That is the reason why the conclusion of these agreements was surrounded by precautions that usually involve the trade unions in order to ensure that the deviation corresponds to a genuine concern of the company and is made also in the interest of the workforce - normally in order to avoid redundancies but also to involve employees in the management's strategy to ensure the satisfaction of shareholders and stakeholders - and is not used as a means of undermining collective agreements.

5.2.3.2.2 Procedural agreements

The evolution of collective bargaining was not limited to flexibilisation agreements. The lawmakers and the social partners have equally been developing new types of agreements destined to overcome the agency costs that incur between employers and employees and to improve the communication channels between them. These types of agreements attempt to reduce the information gap between the management and the workforce by laying out a detailed procedure concerning the sharing of information between both parties. The purposes underpinning these agreements are manifold and cannot be reduced to a single rationale. The best source to understand the intentions of these agreements consists in the European Law on the Participation of the Workforce, in particular of Directive 2002/14. The analysis made above of these legal instruments stressed that the evolution of EU Law seems to be moving towards a more flexible and partnerial approach to social dialogue; this was clearly evident in the preamble of Directive 2002/14 in which the European legislator boldly stated that the purpose of the Directive was to (1) improve the communication channels between management and employees, (2) make the work organisation more flexible and make employees aware of change and (3) engage employees in the success of the undertaking. The procedural agreements correspond to a possible implementation of these purposes as their objective consists exactly in reducing the information gap between management and the workforce in order to fulfil the Directive's objective of flexibilising the organisation of work and engaging employees in the restructuring of the business, at least to offset the negative consequences that restructuring may have to them. The management seems to have clearly understood that these objectives could not be reached unilaterally but only by

means of a participation of the workforce and the employee representatives seem to have equally understood that change is inevitable in companies and that the best means to cope with it and ensure that it will not bring about negative consequences to the workforce consists in the reinforcement of the communication channels between the management and the workforce in order for the employees to devise the necessary anticipatory measures to be able to cope with change. It should be stressed that this seems to amount to a considerable evolution in the purposes of collective bargaining: the previous implementation of the principles of workplace democracy and self-government immanent in collective bargaining that the Canadian Supreme Court stressed in the ruling *Facilities Subsector Bargaining Assn. v. British Columbia* have evolved in Europe (where sector level bargaining prevailed, with the exception of the UK, and the approach to collective bargaining was mainly vindictive) towards a more human resources management approach: the objective now seems to be to be able to make the necessary arrangements in the workplace in order to create room for the necessary restructuring and enact instruments that will provide employees with a tool to manage those restructuring operations. This is particularly important as regards the transformation of the rules of organisation of work since the principles of lean production that have increasingly been taking account of companies demand the active involvement of the workforce in work procedures. The means to achieve these ends consist in a new type of agreements that will be coined as procedural agreements. These agreements consist in conventions setting out a detailed procedure for the sharing of information between the manager and the employees and improve the communication channels between them. They may be limited to this function in order to make employees aware of the state of the undertaking and prepare any anticipatory or they may rather serve as a means of coping with change and attempting to deal in the best possible means with it or at least to offset the possible negative consequences to the employees. The following section will attempt to analyse each one of these agreements in particular.

(a) procedural agreements – in addition to the flexibilisation agreements each jurisdiction under study seems to have been developing a new type of collective agreements whose purpose is not the determination of wages and conditions of work but to regulate the procedure to be followed in the information and consultation of employee representatives. These agreements are applied in a variety of circumstances; although their main focus of application are collective redundancies, they may equally be used in provisional information and consultation, anticipation of change, negotiation of productive procedures, among other circumstances. The common point of these agreements is that they set out a conventional detailed procedure for the information and consultation of employee representatives. The purpose of the procedure is to agree on the calendar and stages to be observed in a certain subject-matter (such as collective redundancies) and attempt to reach a negotiated solution with the employee representatives concerning that same subject-matter. The main advantage of these procedures in relation to the workforce consists in allowing the parties to specify the points that are of greatest interest to them and adapt them to their specific needs and interests. Procedural agreements therefore consist in a negotiated procedure for the information and consultation of employee representatives, set out with the purpose of reaching an optimal harmonisation of the interests of both parties by means of an autonomous agreement focusing on the subjects that are of greatest interest to the parties to the agreement. Statutory regulation is seen as undesirable by both parties because the “*one size fits all approach*” followed by the regulation is regarded as not adequate to the specific needs and interests of the parties. These agreements equally accept implicitly that autonomous company-level social dialogue is the best means to solve conflicts of interest and allow for the readaptation of companies to changed circumstances. The following lines will attempt to determine to which extent each jurisdiction under study has been developing this type of agreements.

(a.1) France – the comparative analysis of the procedural agreements should initiate with the French case because it contains by far the most illustrative example of a procedural agreement. France has recently implemented in its extensive regulatory reform of its system of industrial relations a measure destined to encourage information sharing between the employer and the

employee representatives within the company and regulate autonomously these procedures. The reform consisted in the introduction of what came to be known as method agreements (*accords de méthode*) in French Law; they were introduced experimentally in 2003 by means of the *Lois Fillon* and became a part of the Labour Code definitively in 2005 by means of the *Loi de Cohésion Sociale*; it is currently integrated in the French Labour Code by means of article L1233-21 CTF. The purpose of these agreements consists in encouraging an autonomous regulation of the collective redundancy procedures. The CTF lays out in its arts.L1233-8 to L1233-10CTF the procedure to be followed in the event of a collective redundancy as a transposition of the Collective Redundancies Directive.⁶¹¹ The chapter is followed by another entitled “*specific modalities resulting from an agreement*”; this latter chapter contains several provisions allowing for the social partners to derogate from the statutory provisions and agree on a conventional procedure for the information and consultation of employees in the event of a collective redundancy (art.L1233-21CTF); the law further states that the agreement should regulate, in particular (1) the conditions in which the works council is informed of the economical and financial situation of the company, (2) the procedure to be followed in the proposal of alternative measures to the employer and the employer’s duty to provide for a reasoned answer and (3) the content of the plan for safeguard of employment and measures of professional and geographical mobility (L1233-22CTF). A simple reading of the provisions of the law enables us to understand that the social partners were granted with far-reaching powers as regards the regulation of collective redundancies and that the main purpose of the law is to encourage a conventional regulation of the procedure and the sharing of information between the manager and the employees.

This institutionalisation of the method agreements does not arise from the unitary action of the lawmaker because it has its origins in the practice of collective bargaining. Procedural agreements first appeared at the request of large French industrial groups, which underwent deep restructuring operations

⁶¹¹ In order to see the statutory procedure to be followed in the event of a collective redundancy in the absence of an agreement, see Mazeaud, A. (2006). *Droit du Travail*, Montchrestien, Ray, J.-E. (2006). *Droit du Travail - droit vivant*, Editions Liaisons, Pélissier, J., A. Supiot, et al. (2008). *Droit du Travail*, Dalloz.

during the 1990s that led in many cases to collective redundancies. Since these industrial groups intended to avoid extensive and costly litigations and the externalisation of social conflict to the courts, they took the option of proposing to the trade unions an autonomous regulation of the steps to be observed during a collective redundancy procedure in order to avoid social conflicts. The trade unions accepted to sign these agreements because they provided them with an added advantage in relation to the law; whereas the statutory regulation was essentially reactive and simply intended to provide employee representatives with a procedure to deal with the collective redundancy procedure after the managerial decision was taken, the trade unions saw in these agreements an alert sign of planned redundancies, which allowed them to be prepared for the forthcoming social measures and prepare beforehand the necessary bargaining procedure. In this sense, it was equally a movement from a reactive towards a proactive approach to collective redundancies that was outline above on occasion of the analysis of EU Law. The success of these agreements led to their institutionalisation in 2003 and 2005.⁶¹²

The analysis of the legal framework of these agreements reveals that they provide the social partners with a considerable degree of flexibility. The intention that seems to be underlying the provision is to suspend the procedure in order to create incentives to bargain. Considering that the collective redundancies procedure laid out in the statute is considerably burdensome and capable of provoking social conflict, the law maker decided to provide the social partners with a means of offsetting these potentially hazardous consequences for the procedure at stake and provide the social partners with a margin of manoeuvre for them to agree on a conventional procedure. The margin of manoeuvre provided to the social partners was extremely large because these method agreements may be concluded at the company, group or industry levels (L1233-21CTF). If we connect this possibility with the evolution of derogatory agreements outlined above in which it became evident that the focus of collective bargaining is currently the company level, it becomes clear that the objective of the provision is to encourage the bargaining of these

⁶¹² Petrovski, M. and D. Paucard "Les accords de méthode et leur impact sur les procédures d'information et de consultation des représentants du personnel : quelques résultats à partir de huit études de cas." *Revue de L'IRES* 50(1): 103-136.

agreements at the level of the company in order to encourage social dialogue at that level; in the event that the employer is not satisfied with the statutory procedure or the procedure laid out in the industry agreement, it may initiate negotiations with union representatives at the level of the company in order to bargain its own method agreement and accelerate restructuring operations in the event that it intends to implement one. In addition, the social partners are bound to very few limitations: the only limits to the possibilities of derogation of the conventional agreement are laid out in art.L1233-23CTF and consists in the duties of training, adaptation and classification incumbent upon the employer and the rules for information and consultation of the works council and staff-representatives, whose minimum statutory framework must be guaranteed and the conventional rules may only improve upon. Therefore, the social partners may, having regard to the minimum content of the rules on information and consultation of the works council and staff-representatives and the employer's duties of training, freely bargain a conventional information and consultation agreement concerning collective redundancies at the company, group or industry levels (being that the lower level prevails). This preference for the most decentralised level comes in the line of the process of decentralisation of collective bargaining that has been analysed in its several dimensions. The company level is preferred to the industry level because there is the perception that the industry level is not sufficiently adequate to the needs of specific companies, in particular as regards the plan of safeguard of employment. There is an incentive for the bargaining of company-specific solutions.⁶¹³

The social partners equally enjoy a wide margin of manoeuvre in the determination of the content of these agreements because there are few limitations to the possibilities of derogation of the law. Considering that the natural tendency of the agreement is to regulate the modalities of information and consultation of the works council as soon as the employer intends to implement a collective redundancy, it is no wonder that the content of the agreements is fundamentally procedural and that the main purpose of the procedure is to provide the works council with sufficient instruments to be able

⁶¹³ Antonmattei, P.-H. (2003). "Licencements économiques et négociation collective: un nouvel accord collectif de travail est né.", Antonmattei, P.-H. (2005). "Accord de méthode, génération 2005: la "positive attitude".", *Droit Social*(4): 399-402, Pélissier, J., A. Supiot, et al. (2008). *Droit du Travail*, Dalloz.

to formulate alternatives to the planned redundancies or to mitigate its consequences; if we couple this with the employer's duty to provide a reasoned answer to the questions of the employee representatives, then there is strong evidence that the purpose of the procedure is to stimulate the social dialogue at the level of the company and engage employees in the planned restructuring procedures without ever questioning the employer's managerial prerogative.⁶¹⁴

The industrial relations scholarship has undertaken several studies concerning the content of these agreements and they have devised four main types of agreements. These agreements may be (a) at the benefit of the employer, (b) of reciprocal guarantee, (c) of procedural legitimation and (d) preliminary agreements. An agreement is said to be at the benefit of the employer if they refrain from laying out more detailed procedures concerning the proposal of alternatives or the information of the works council and simply set out the stages for information, the bargaining of the compensation and the dates from which the redundancies may be pronounced. An agreement is said to be of reciprocal guarantee if it contains an engagement on the deadline of the procedures in consideration for particular measures provided for in the agreement, most often of a pecuniary or social nature (such as compensation for redundancy or early retirement). An agreement is of procedural legitimation if they lay out not only the single steps of the procedure but equally the conditions for the passage from one step to the other in such a way as to ensure a complete exploitation of the restructuring project; for instance, the consultation may begin only after the employee representatives consider themselves sufficiently informed as concerns the restructuring project and the conditions in which it will be implemented. Finally, the preliminary agreements consist in engagements to bargain a method agreement when the employer plans to implement a restructuring project. They are destined to make employees aware of the existence of such a project and to take the necessary anticipatory measures already in the bargaining of the agreement. These agreements are normally coupled with several substantial guarantees for both parties. The most important substantial guarantees consist in the content of the information and the indication of the measures envisaged. As regards the

⁶¹⁴ Antonmattei, P.-H. (2005). "Accord de méthode, génération 2005: la "positive attitude"." *Droit Social*(4): 399-402.

content of the information, it is common that these agreements determine exhaustively the information to be provided to the representatives of the employees in order for them to be acquainted with the concrete situation of the undertaking. This information is of extreme importance because it is based upon it that the employees will not only be able to exercise control over the veracity of the reasons put forward by the employer for the restructuring but equally of the most adequate anticipatory measures to be proposed. For example, if the company is in serious economical trouble then the employee representatives should focus on bargaining redundancies; if the company on the other hand is simply restructuring its business then the works council may propose alternative measures such as professional and geographical mobility in order to avoid redundancies and allow the company to implement its restructuring operation. This leads us to the second type of substantial guarantee contained in these agreements: the reform measures envisaged. The employee representatives need to be able to know which type of measures are envisaged in the restructuring project in order to be able to propose viable alternatives. The diversity of the types of agreements and the substantial guarantees usually contained in them are sufficient to understand their advantages and their role in promoting self-regulation of restructuring projects.

615

The conclusion of these agreements brings several advantages both for the employer and for the employees. As regards the employer, the agreement brings with it the advantage of guaranteeing the procedure. The employer is able to know with certainty which steps it is going to have to undertake in order to implement the decision and its reasonable duration. Considering that the procedure is usually bargained with the employer (or may be bargained with the employee), the employer will be able to propose and agree on a procedure more adequate to its organisational needs. A final mechanism of extreme importance consists in the fact that the agreements may and effectively have designed conflict-solving mechanisms in order to overcome impasses and delays in the procedure. Since these mechanisms are agreed with the trade

⁶¹⁵ Petrovski, M. and D. Paucard "Les accords de méthode et leur impact sur les procédures d'information et de consultation des représentants du personnel : quelques résultats à partir de huit études de cas." *Revue de L'IRE* 50(1): 103-136, Gaudu, F. (2008). "Les accords de méthode." *Droit Social*(9/10): 915-923.

unions, then one can expect a greater degree of adhesion to them than if it is merely statutorily imposed and there is uncertainty and unwillingness to follow the details of the procedure. The employees equally have several benefits in the conclusion of these agreements. They may agree to have resource to additional guarantees to assist them in the bargaining (such as the assistance of experts, complementary logistics and ad hoc dialogue structures) in order to ensure the best communication channels between the employer and the employee representatives and to effectively provide them with an active voice in restructuring operations.⁶¹⁶

This description of the functioning of the method agreements allows us to understand the reasons underpinning their introduction in 2003. The lawmaker had a double purpose: to diffuse by statutory means a promising innovation with the purpose of promoting company-level social dialogue and to create incentives for a dynamic that fed a national bargaining and allowed for the modernisation of the rules currently enforced that were increasingly away from the rapidly changing economical and social realities. The following benefits are generally pointed out to these agreements: firstly, they reduce the information asymmetries that occur between the management and the workforce within the company; the employee representatives have an instrument to be able to demand more information concerning the concrete situation of the company and bargain more effectively in the defending their interests. This encourages social dialogue within the company and make employees aware of the probable evolution of the situation of the undertaking and the fate of their jobs therefore reducing the information asymmetries between the management and the workforce and allowing employees to propose the necessary anticipatory measures. Secondly, these agreements equally improve the quality of the information and the adequacy of the deadlines, allowing for a reduction of the distance between the regulation of the concrete procedures and the concrete needs of the actors. It is often the case that the statutory regulation of the information and consultation procedures is inefficient because it doesn't take into account the concrete needs of the actors. The bargaining of ad hoc procedures allows for the social partners to

⁶¹⁶ Didry, C. and A. Jobert (2008). Les accords de méthode en matière de restructurations : un nouveau champ du dialogue social, IDHE CNRS.

overcome these inadequacies and bargain an agreement more adequate to their concrete needs and therefore increase the chances of a successful outcome. This is generally made by means of the reinforcement of the quality of the information to be provided by the management board and the autonomous regulation of the procedures. Thirdly, the interaction between the actors creates several incentives for further bargaining. The parties not only have to bargain to reach an agreement, as they also have to bargain during the performance of the agreement. This allows the parties to acquaint themselves and to understand their dynamics therefore creating indirect incentives to open up the bargaining table and discuss other issues of mutual interest that will end up reinforcing company-level social dialogue. Finally, the procedure requires the parties to bargain before the measure is implemented. This is an added advantage because the pressure to bargain before the restructuring measure is implemented is capable of influencing the outcome; if the parties sit without any pressure of a restructuring measure then they may bargain at equal arms and propose a mutually advantageous solution that safeguards the interests of both parties. This serves as a safeguard to the latter bargaining that will be made "*à chaud*".⁶¹⁷

This short description of the functioning of the method agreements in French law is capable of providing us with an insight as regards its function. Method agreements are, for this moment, limited to collective redundancies procedures but its importance should not be underestimated. The implementation of method agreements in French law comes in the line of decentralisation of collective bargaining and the reinforcement of social dialogue at the level of the company that this chapter has been attempting to describe and they consist in an implementation of those principles in the subject of collective redundancies. The introduction of method agreements presupposes three great principles: firstly, that regulation is inadequate and should only be implemented in the event that the parties fail to reach an agreement; this emphasis on self-regulation is extremely important because it

⁶¹⁷ Petrovski, M. and D. Paucard "Les accords de méthode et leur impact sur les procédures d'information et de consultation des représentants du personnel : quelques résultats à partir de huit études de cas." *Revue de L'IRE* 50(1): 103-136, Jobert, A. and J. Saglio (2004). "Ré-institutionnaliser la négociation collective en France." *Travail et Emploi*(100): 113-127, Ravaux, A. d. (2006). "Négocier les restructurations après la loi du 18 janvier 2005: aspects pratiques " *Droit Social*(3): 298-302, Didry, C. and A. Jobert (2008). Les accords de méthode en matière de restructurations : un nouveau champ du dialogue social , IDHE CNRS.

implies that a greater responsibility of the parties in finding a solution to situations of crisis in the company. Secondly, the procedure implies that employees accept redundancies and restructuring as necessary and that they attempt to safeguard their interests by means of a constructive approach that passes by dialogue with the management, the reduction of information gaps as regards the concrete situation of the company, employee involvement in the success of the undertaking and the proposal of alternative measures to attempt to avoid redundancies. Finally, the introduction of method agreements also presupposes that the parties are able conciliate their interests and agree on a procedure that best safeguards their interests and is able of leading to a mutually advantageous solution. The implementation of these three principles is reminiscent of the principles enunciated in the evolution of the European Law on the Participation of the Workforce with the evolution from reactive towards the proactive Directives and their emphasis on voluntary regulation by the parties concerned and a more active approach by the employees in the company. In this sense they are pure procedural agreements because they lay out a detailed voluntarily agreed procedure to be followed in one specific event (a collective redundancy). Its impact is capable of being much wider however because the rules concerning the sharing of information between the parties of the agreement that presupposes more employee involvement in the company and the efficient preparation of anticipatory measures may serve as a means of encouraging a more active involvement of the employees in the life of the company. In this sense, they may not be understood merely as a voluntary procedure regulating collective redundancies: they may be understood as a more active involvement of the management and employees in the life of the company that presupposes the acceptance by both parties that change is inevitable but that it may be bargained in order to reach a mutually advantageous solution. In this sense, company level social dialogue helps to contribute to the competitiveness of companies while offsetting the negative consequences for the workforce.

(a.2) Germany – the German panorama of collective bargaining has equally exhibited some experience with procedural agreements. These agreements in Germany are named as “*agreements for the protection against rationalisation*” (*Rationalisierungs-schutzabkommen*) and their main purpose is to regulate the restructuring procedures in companies in such a way as to minimise their social consequences. They function in a very similar way to the *accords de méthode* described above: they accept that restructuring is necessary and then they attempt to improve the communication channels between the manager and the employee representatives by means of the regulation of the deadlines of the restructuring procedure and the alternative measures proposed in order to mitigate their consequences. The following lines will attempt to provide an overview of the structure of these agreements in such a way as to provide a picture of their functioning.

The origins of these agreements must be traced back to the employment crisis of the end of the 1960s and beginning of the 1970s. During this period, several companies undertook severe restructuring measures that led to mass redundancies and social conflicts. The trade unions assumed the role of attempting to intervene and defend employee interests during those times due to the inability of works councils to deal with the problem and the fact that these measures were not limited to single companies but to entire sectors of activity. This was, perhaps, the first blow to the traditional division of competences between trade unions and works councils that had underpinned the German system of industrial relations because the trade unions did not look only to the industry level but they also took into account the interests of the employees in the industry concerned. The reasons underpinning these restructurings consisted not only in the international economic crisis that began to give its signs during that era but in particular in the introduction of new methods of organisation of work, technologies and organisation of companies. This led to several harsh consequences for the employee that took the form of redundancies, wage losses, waste of qualifications, intensification of work among other issues. The works councils proved ineffective in the regulation of these issues by means of their codetermination powers because they did not possess the necessary knowledge and bargaining strength to be an effective social opponent to the employer. That was the reason why the trade unions decided to take the issue into their hands and enlarge their activity from the

regulation of wages and working conditions towards a more company-focused *Tarifpolitik* that could provide an effective answer to these rationalisation measures at the benefit of the employees.⁶¹⁸

The study concerning the conventions on rationalisation must initiate with the definition of rationalisation. This is where we can find the first difference concerning the “*accords de méthode*” analysed in the previous paragraph; whereas in France the method agreement is defined by its result (it is to be implemented when the employer is contemplating redundancies), in Germany the procedural agreement is defined by its cause. The legal scholarship analysed several agreements and concluded that rationalisation, at the eyes of the *Tarifpolitik*, consists in the modifications in the structure and organisation of companies that is capable of having an impact on the personnel. This means that the agreement is not reduced to redundancies (although most often “*restructuring*” is an euphemism for redundancy) but is designed to implement restructuring operations in companies. Company restructuring (*Betriebsänderungen*) and particular company operations can be the object of collective agreements without infringement to §111BVG. Although these collective agreements are primarily concerned with the regulation of the consequences of the restructuring measures, they may equally cover the modalities of performance of work and the introduction of new techniques. The purpose of these agreements consists in regulating the introduction of these new work procedures and the restructuring operations that companies were undergoing at the time. They set out either industry or company-specific minimum procedures for the introduction of these modifications in companies that favour the position of the employees in these restructuring operations.⁶¹⁹

The measures contained in these legal instruments consisted fundamentally in (a) the guarantee of the labour post and (b) the protection of wages. As regards the guarantee of the labour post, this is usually achieved by means of the conventional regulation of the procedures for dismissals. These agreements usually introduced indirect protections against dismissals by

⁶¹⁸ Mückenberger, U. and H.-H. Lühr (1980). "Dokumentation zum Rationalisierungsschutz." *Kritische Justiz* **13**(84-102).

⁶¹⁹ Däubler, W., M. Kittner, et al., Eds. *BetrVG mit Wahlordnung und EBR-Gesetz*, Bund-Verlag. Richardi, R. and O. Wlotzke (2000). *Münchener Handbuch zum Arbeitsrecht*. München, C.H Beck. §122,n.º 86.

means of the regulation of the deadlines for dismissal and the duty to search for alternatives. These measures did not prohibit or directly limit the possibilities of redundancy but simply contained provisions on a qualitative and quantitative staffing of labour positions (*Arbeitsplatzbesetzung*) that had a general effect in the labour force (as opposed to a particular effect on individual employees). An example of qualitative guarantee of labour positions consisted in some measures contained in collective agreements that reserved the occupation of some labour posts to particular categories of qualified employees even if those qualifications were not strictly necessary for the performance of that particular task. A quantitative guarantee consists in the compromise to employ a certain number of persons within a certain activity in order to ensure the maintenance of the labour posts within that activity. A measure that also indirectly protects large groups of employees against redundancy consists in the duty of professional and geographical mobility; the implementation of the restructuring measure must not be accompanied with a dismissal if the mobility towards the new department of the company or towards new geographical units is possible; the employer is obliged to propose that mobility before engaging in the redundancy. Another protective measure that is usually found in these collective agreements consists in the duty to promote professional training; in the event that the employer wishes to introduce new working techniques, it assumes the compromise to allow workers to undergo professional training in order to avoid redundancies and allow the implementation of the necessary work procedures. These measures of professional training may assume a number of modalities such as (a) time off, (b) payment of the training courses, etc. In the event that the redundancies are considered unavoidable, the rationalisation agreements attempt to fight them by means of the regulation of the redundancy deadlines and the severance payments. The regulation of the deadlines for redundancies had a clear purpose: it intends on the one side to avoid social conflicts and allow the parties to agree on a procedure to implement a measure; it intends on the other hand to provide the employees and their representatives with a means of fighting for the labour post and ensuring that the redundancy is really the *ultima ratio* of the procedure; in this sense it consists in a procedural guarantee. The regulation of the severance payments also pursues several interests: on the one hand, it is in the interest of both parties to have clear rules for the determination of severance payments

that have the agreement of both parties in order to avoid costly social conflicts in the form of strikes and court action; on the other hand, the determination of the severance payments may equally serve as a means of deterrence from the redundancies in order to oblige the employer to weight the pros and cons of the redundancy and the expected benefits from the restructuring or if alternative measures could prove less costly.

These provisions equally have detailed provisions concerning the protection of wages. The protection of wages is destined to ensure that the implementation of the restructuring measure does not entail negative consequences for the remuneration of the employees. There is a number of means to achieve this: for instance, some clauses provide for the guarantee of the previous wage in the reorganisation of work; in the event that the internal working procedure within the company is reorganised and the worker is assigned to new tasks or groups, these clauses ensure that the employee will retain its previous remuneration at least for a certain duration (e.g: one year). This serves as a compensation for the unilateral modification of tasks and a subvention to allow the worker to adapt its lifestyle to the prospects of a reduced remuneration in the future. The same thing applies to subventions when the worker faces unexpected costs as a consequence of a modification in the geographical location of its labour post.⁶²⁰

The analysis of these clauses allows us to understand the classification of these agreements as procedural agreements. They are intended to regulate the procedure and social consequences of the restructuring measures but not the measures themselves. The decision to undertake a restructuring belongs solely to the employer who is limited only by the co-determination powers of the works council contained in the BVG. In a similar way to the method agreements, they imply that restructuring is necessary and that it is in the interest of both parties to regulate the restructuring procedure then to engage in costly strikes and litigations that bring no additional benefit to no one. The scope of these agreements is apparently quite large since they are applicable not only in situations of redundancies but in all situations of restructuring that

⁶²⁰ See the interesting examples in Mückenberger, U. and H.-H. Lühr (1980). "Dokumentation zum Rationalisierungsschutz." *Kritische Justiz* 13(84-102). and Däubler, W. (2006). Das Arbeitsrecht - die gemeinsame Wahrung von Interessen im Betrieb, Rowohlt Taschenbuch Verlag

imply the implementation of new work procedures, as the definition of “*rationalisation*” demonstrated. Despite this apparent wide scope of application, a closer look reveals that the parties are fundamentally concerned with the regulation of the social consequences (*i.e.*: redundancies). This regulation focuses on three aspects: firstly, it is concerned with avoiding redundancies and ensuring alternative measures that will stabilise the labour post; secondly, in the event that redundancies may be avoided, they are concerned with ensuring a smooth transition to the new occupation; finally, in the event that redundancies cannot be avoided, they are concerned with determining the severance payments; this previous determination performs two fundamental functions: it attempts to deter redundancies and oblige the employer to calculate the costs and benefits of the redundancy and, in the event that the redundancy cannot be avoided, it attempts to avoid social conflicts by determining beforehand with clear criteria the compensation that the employee will receive. These agreements are of great utility to companies because they allow them to undergo a quick and effective restructuring without social conflicts while safeguarding the interests of the employees.

(a.3) UK – the UK seems to have equally exhibited some experience with procedural agreements although – as the following lines will attempt to demonstrate – the types of agreements developed in the UK differ to a substantial degree from the ones that we have been analysing. The procedural agreements in France and in the UK were born in systems dominated by industry level bargaining and were designed to allow companies to implement restructuring procedures with a minimum degree of social conflict. The British panorama of collective bargaining – underpinned in a heavily decentralised system in which collective agreements are deprived of a binding effect (at the request of the trade unions, who have fiercely opposed all attempts to classify the agreements as binding) – was inapt to the development of similar agreements because the institutional endowment is completely diverse. There is evidence however that EU Law has had further influence in the development of new types of agreements in the subjects of collective redundancies and the information and consultation of employees regulations that managed to influence to some extent the restructuring procedures the companies wished to implement without undermining the absence of a binding nature of collective

agreements. These agreements must be contextualised within the British system of industrial relations in order to understand their role and impact.

The first relevant innovation came in the form of “*new style agreements*” that were developed in the UK during the 1980s and 1990s. These new style agreements were the trade unions’ response to the developments in corporate governance and firm organisation; they placed an emphasis on new cooperative approaches of fundamental and long-run import. These new style agreements were developed in a number of industries (most notably, but not reduced to, microelectronics) and consist in a number of related elements in collective bargaining agreements that attempt to overcome the former adversarial approach that characterised British collective bargaining and achieve a more cooperative approach with the management and engage employees in the success of the firm; they were prominently use in restructuring procedures (which did not necessary lead to redundancies) and attempted to gain employee adhesion to the success of the company and the need of change to remain competitive. The elements that were usually inserted in those agreements consisted in the following clauses: (a) union recognition clauses, (b) no-strike clauses, (c) agreement on arbitration procedures to overcome impasses, (d) improvement of communication channels between the management and the unions, (e) substantial information sharing by the management board, (f) participative institutions and (g) substantial flexibility underpinned in training.⁶²¹ Before advancing any further, it is useful to review the content of these clauses in order to understand the innovations that they brought about to British industrial relations.

Union recognition clauses consist in the voluntary recognition of one or more unions that enjoy sufficient support among the rank and file; in the event that there are several unions in the company, the recognition is conditioned to the setting up of a single bargaining table. The objective of the recognition and the imposition of a single bargaining table were to achieve a single employee representative that would serve as an interlocutor in front of the management board. This ensured that the management board would have someone to address and develop a working relationship with. The recognition of the unions

⁶²¹ Davies, P. and M. Freedland (2004). National Report United Kingdom. The evolving structure of collective bargaining in Europe 2004. S. Sciarra, European Commission, University of Florence.

must be complemented with the agreement on a non-strike clause. The unions agreed not to go on strike in exchange for recognition and setting up of more permanent social dialogue. The purpose of the no-strike clause consisted in a joint commitment by the management and the unions to solve their disputes without engaging in industrial action. This is extremely relevant if we take into consideration that the use of industrial action was the main instrument of the trade unions to force employers into collective agreements and oblige them to engage in a more permanent social dialogue in the absence of the duty to recognise trade unions; the forgoing of the “right” to industrial action is a significant issue because – although it is not legally enforceable – it stands as the ultimate compromise of the trade unions to overcome the traditionally adversarial approach to collective bargaining and engage in a more cooperative attitude.⁶²² The forgoing of the “*right to strike*” was completed with the agreement on alternative conflict solving mechanisms; these mechanisms usually consist in a forum for advice, consultation and relevant company information. In the event that an autonomous solution is not possible, the parties usually agree on a voluntary arbitration procedure, which consists in the resource to a third party that will attempt to conciliate their interests; if no conciliation is possible, then this third party will issue a decision that the conflicting parties promise to abide with and perform. The remaining clauses – equally complementary between themselves – are easily found in new style collective agreements. The agreements provide for the improvement of the communication channels between the management and the rank and file. This improvement may assume various forms such as a more precise definition of the information to be transmitted, the definition of the periodicity of the information, the setting up of employee consultation mechanisms to hear their remarks concerning the organisation of work, among other issues that are

⁶²² This sentence deserves further explanation. There is no properly said “*right to strike*” in British Law; the “right to strike” was built negatively as an immunity from tortious liability in the context of the recognition of a legitimate industrial dispute. This tortious immunity is extremely significant in British law because the trade unions use it as a means of forcing the employer to renegotiate the collectively agreed provisions in the event of a change in circumstances; the unions oppose the enforceability of collective agreements because the employers would use them as a defense mechanism (*pacta sunt servanda*) to avoid renegotiations when the collective agreed provisions became inadequate to the new circumstances. This is a violent but effective means of forcing a more permanent social dialogue in a system characterised by the absence of a duty to recognize unions (before the statutory recognition procedure) and the duty to bargain. See Deakin, S., William S. Morris (2005). Labour Law. Oxford, Hart Publisher.

completely open to the willingness of the parties. This improvement in communication channels is of utmost importance in the introduction of a new method of organisation of work that consists in lean production; these agreements normally contained provisions relating to the introduction of team-work and labour flexibility (in the form of pay connected to productivity and job security dependent on progression by professional training efforts), which consists in nothing else rather than lean production; it is worth noting that these methods of production also depend heavily on a good channel of communication with the management board and the existence of peaceful conflict solving mechanisms – hence the emphasis on union recognition, single-table bargaining and no-strike clauses.⁶²³

This short description of the new-style agreements reveals that they may be considered as procedural agreements although they have a distinct reach from the ones analysed before. The purpose of these agreements is to set out a procedure to be followed in the engagement of the employees into the life of the company by means of the improvement of the communication channels and the introduction of new work procedures. This last aspect of the new work procedures is of utmost importance because the emphasis that they place on social dialogue and teamwork depends of a cooperative system of industrial relations. The transition of the adversarial towards the cooperative system was achieved by two means: firstly, by the voluntary recognition of trade unions and the setting out of a single bargaining table; this is of utmost importance because it provides the employees with one independent and reliable representative and the management board with a viable interlocutor. Secondly, the transition was equally achieved by means of the forgoing of the right to strike and the setting up of voluntary conciliation and conflict-solving mechanisms that will attempt to avoid social conflict and achieve mutually beneficial outcomes. This allows companies to introduce new forms of working procedures, restructure both internally and externally and adapt more easily to a fluctuating environment without social conflict and attempting to capture

⁶²³ Rico, L. (1987). "The new industrial relations: British electricians' new style agreements." Industrial and Labor Relations Review 41(1): 63-78. Basset, P. (1987). Strike free: new industrial relations in Britain, Papermac, Brewster, C. (1992). Collective agreements: old and new styles. A Handbook on Industrial Relations Practice: Practice and Law in the Employment Relationship B. Towers, Kogan Page: 152-166, Davies, P. and M. Freedland (2004). National Report United Kingdom. The evolving structure of collective bargaining in Europe 2004. S. Sciarra, European Commission, University of Florence.

employee adhesion to the furthest extent by guaranteeing that they have a means of safeguarding their interests by means of their representatives. This is a voluntarily agreed procedural means of restructuring companies more easily and quickly and avoiding social conflict.

Another significant innovation in the British panorama of collective bargaining consisted in the implementation of Directive 2002/14. The British lawmaker took an innovative approach to social dialogue that attempts to encourage the parties to reach voluntary agreements on information and consultation of the workforce by reflexive means.⁶²⁴ The details of the procedure had been analysed above, on occasion of the analysis of the evolution of the actors in British law, and they will only be briefly recalled here. The Information and Consultation of Employees Regulations, transposing Directive 2002/14, created a works council type body within companies to the detriment of trade unions. This body may be set up in the company either at the request of at least 10% of the employees or at the request of the employer. The setting up of this body is necessarily accompanied with the enactment of a procedure to bargain an ad hoc information and consultation agreement. This agreement must abide by the requirements of Directive 2002/14, which requires employers to inform and, in some situations, consult or consult with a view to reaching an agreement employee representatives on a wide range of issues, namely (a) recent and probable development of the activities of the undertaking and its economic situation, (b) situation, structure and probable development of employment within the company and the anticipatory measures envisaged when employment is threatened and (c) decisions likely to lead to substantial modifications in work organisation and contractual relations. The British lawmaker took the innovative approach of refusing to implement an upside-down information and consultation procedure and preferred to use the technique of reflexive law to encourage companies to bargain their own agreements that abided by the requirements of the Directive. In a similar way to what occurred with the European Works Council Directive, the lawmaker

⁶²⁴ The concept of reflexive law is extremely known and has been widely used. It consists in an indirect means of lawmaking in which the legislator creates incentives for the parties to reach an agreement on the substantive issues rather than imposing the solution upside-down. The content of the law is merely procedural and is limited to guiding the behaviour of the parties towards an agreement. See Teubner, G. (1982). *Reflexive Rationalität des Rechts*. Working Papers. Florence, European University Institute.

exempted companies from implementing this bargaining as long as they had in force a pre-existing information and consultation agreement that abided by the requirements of Directive 2002/14. This means that all companies within the thresholds defined by the Directive will at least have the possibility of having substantial information and consultation procedures within them.

The maximum flexibility provided to the management and employee representatives in the bargaining of the information and consultation arrangements is simultaneously an advantage and a danger that must be used with precaution. The maximum degree of flexibility provided by the Information and Consultation of Employees Regulations is particularly adequate to the voluntarist system of industrial relations in Britain in which both employers and trade unions traditionally strongly opposed the enforceability of collective agreements and a rigid regulatory framework so that they could conform social dialogue in accordance with their own needs. The fact that the bargaining is to be made at the company basis is also of extreme importance because it allows the management and the employee representatives to bargain the agreement that best fits the requirements and internal organisation of the particular company unconstrained by the general regulations that would be applicable regardless of the types of companies. There is anecdotic evidence of the flexibility of firms in the bargaining of these particular arrangements, which include examples such as: German style companies councils, French style joint consultative committees, several levels of representation along the internal structure of the company and its articulation, union based arrangements, different information and consultation arrangements for distinct parts of the workforce (similar to the organisation of employee representation in *Sparten* and *Arbeitsgruppen* in German Law) and direct forms of participation among other elements.⁶²⁵ The various arrangements described and the flexibility provided to the employer and employee in their agreement allows them to devise the form of representation that best fits the internal organisation, culture and needs of the company. This must be coupled with another important provision in the Information and Consultation of Employees Regulations that mimics the solution found in the European Works Council. In the event that the

⁶²⁵ Hall, M. (2006). "A cool response to the ICE regulations? Employer and Trade Union approaches to the new legal framework for information and consultation." Industrial Relations Journal 37(5): 456-472.

employer previously had within its company a voluntary agreement that sufficed to fulfil the requirements of the Directive then it will be able to leap the duty to bargain and simply enforce this previous arrangement. This equally ensures a maximum degree of flexibility within the company because if the employee representatives were satisfied with the previously bargained arrangements (independently of any statutory imposition) then the regulations will respect these arrangements (as long as they conform with the requirements of the Directive) and not impose any other solutions that could unbalance the equilibrium voluntarily found within the company.

This internal flexibility equally carries a danger with it: there is the danger that this flexibility and the natural predominance of the employer within the company (in a system characterised by low levels of protection against redundancies) will lead to the agreement on very feeble forms of participation that will compromise the intention of the Directive. The employer might be tempted force the employees into an agreement that could be used to escape the statutory or union regulations and merely provide “lip service” to the employees therefore compromising the intention of the Directive. That is the reason why the public authorities devised measures to protect employee representatives and provide a minimum content to the agreements. The British Department of Trade and Industry issued a guide to the Information and Consultation of Employees Regulations that provided guidelines to interpret the content of each one of the information to be provided and the scope of the duty to inform, consult and consult with a view to reaching an agreement. An important element is the scope of the duty to consult with a view to reaching an agreement: the DTI was extremely clear in stating that the duty to reach an agreement did not place in question the managerial prerogative (which remained untouched) and it did not mean negotiation, bargaining or co-decision but simply an exchange of views and establishment of dialogue between the management and the employee representatives in good faith and making the best efforts to reach a mutually advantageous solution. This is a very clear statement of the purpose of the Directives: it is not to set up a German style co-determination structure (although the parties are free to do so if they (unlikely) agree to it) but simply to improve the communication channels within the company and create a culture of dialogue between the management and employee representatives; more active forms of involvement are expected to

arise reflexively from this new culture of dialogue and exchange of views between the management and the employee representatives.⁶²⁶ Another procedural safeguard consists in the fallback provisions provided for in the Regulations. In the event that the employer and the employee representatives fail to reach an agreement and there is no previous agreement on information and consultation in force within the company then the employer will be obliged to follow the standard information and consultation provisions provide for in the regulations. This is a situation similar to the one provided for in the European Works Council and serves not only as a procedural safeguard to the employees but equally as a means of creating incentives to the bargaining of an autonomous agreement.⁶²⁷

The analysis of these two types of agreements allows us to understand that the UK has equally developed some form of procedural agreements, in the sense of agreements destined to facilitate the restructuring of companies, albeit the scope and techniques were slightly distinct from the ones found previously in France and in Germany. Whereas the cases of the *accords de méthode* and the *rationalisierungsschutzabkommen* were fundamentally concerned with the procedure for collective redundancies and the forms of avoiding social conflicts, the new-style agreements and the information and consultation agreements had a distinct scope: they were destined to improve the communication channels within the company in order to gain employee adhesion, make them acquainted with the needs and possibility of restructuring and attempt to bargain the most appropriate restructuring measures and avoid social conflicts. The new style agreements consist in an implementation of this principle: the combination of clauses of union recognition, no-strike clauses, peaceful conflict solving mechanisms and the improvement of communication channels within the company seemed to have the clear purpose of evolving from an adversarial

⁶²⁶ Deakin, S., William S. Morris (2005). *Labour Law*. Oxford, Hart Publisher, Lorber, P. (2006). "Implementint the Information and Consultation Directive in Great Britain: a new voice at work." *International Journal of Comparative Labour Law and Industrial Relations* **22**(2): 231-258.

⁶²⁷ Ewing, K. D. and G. M. Truter (2005). "The Information and Consultation of Employees Regulations: voluntarism's bitter legacy." *Modern Law Review* **68**(4): 629-641, Hall, M. (2006). "A cool response to the ICE regulations? Employer and Trade Union approaches to the new legal framework for information and consultation." *Industrial Relations Journal* **37**(5): 456-472, Lorber, P. (2006). "Implementint the Information and Consultation Directive in Great Britain: a new voice at work." *International Journal of Comparative Labour Law and Industrial Relations* **22**(2): 231-258. Deakin, S., William S. Morris (2005). *Labour Law*. Oxford, Hart Publisher.

towards a cooperative approach in industrial relations and implement the necessary restructuring measures by procedural means: the employees would be permanently informed of the situation of the undertaking and the measures envisaged, the management would attempt to reach a voluntary agreement and the impasses would be overcome by means of a resource to voluntary arbitration; this is a procedural means of overcoming differences of interest, gaining employee adhesion and making companies more flexible and competitive. The fact that they go beyond the limited scope of collective redundancies provides them with wider possibilities of impact. The voluntary information and consultation agreements that arose from the transposition of Directive 2002/14 may equally be inserted in this classification. The innovative approach of the British legislator to allow the parties maximum freedom to bargain their own arrangements and the reflexive technique used in lawmaking encouraged the parties to determine the procedures for information and consultation of employees that best fit the needs of their companies. This is a procedural form of implementing the duties of information, consultation and consultation with a view to reaching an agreement; the improvement of the communication channels within the company and the introduction of the duty to promote a fair exchange of views and the establishment of dialogue between the management board and the employee representatives by allowing them the maximum freedom to bargain their own arrangements to achieve this purpose is a means of facilitating restructuring of companies and a more active involvement of the workforce.

(a.4) Portugal – Portugal was the only country that failed to provide evidence of the use of procedural agreements in its industrial relations panorama. The reasons underpinning this reality are not due to an absence of interest of the trade unions or the employee representatives to regulate the issue but the regulatory burdens. The law exempts collective redundancies from the action of the trade unions (arts. 339CTP only allows trade unions to determine the deadlines of the procedure and the compensations to be paid but since both of these elements are already provided for in the law in a very generous form the trade unions do not see a point in modifying the statutory regime) and the procedures to be used in the remaining company restructurings (such as lay-offs or temporary closures) are also laid out in the law in a very detailed and

generous form. This does not mean that the lawmaker is not interested in employee involvement in company-restructurings; it simply means that the procedures are not the result of the action of the trade unions but of the will of the legislator. There are two procedures worth noting in this aspect: the procedures for the temporary closure of activity and the procedure for collective redundancies and extinction of labour posts. It is worth viewing them in some detail.

The Portuguese Labour Code allows the employer to suspend the performance of the labour contracts in some situations. In these situations, the employee will not have a duty to perform work and will be entitled to receive remuneration from the Social Security besides the possibility of performing salaried work elsewhere; the employment relationship is maintained but simply “frozen” as regards the rights and duties of the parties (art.295 CTP). The employer may suspend the performance of the labour contract in three situations: (1) in situations of entrepreneurial crisis in order to avoid collective redundancies, (2) in situations of impossibility due to an Act of God and (3) in situations due to the employer’s own interest (e.g. because he wants to reorganise the company internally). Although the law is extremely clear in leaving the managerial prerogative of the employer untouched in these situations, the employer nonetheless must undergo a procedure to implement them.

If the employer wants to suspend the labour contracts for reasons connected to an entrepreneurial crisis that is capable of leading to redundancies, the employer is obliged to communicate in a written form its intention, the detailed reasons and the workers affected to the works council or the trade union section or the employees affected; in the absence of any of these bodies, the employees affected will be entitled to elect a representative to initiate the consultation procedure (art.299). The consultation procedure has a particular characteristic: the employer is not only obliged to inform and consult the employee representative; the law clearly states that he is obliged to bargain the consequences of the suspension of the labour contract with the employee representatives; these consequences may be a total or partial suspension of the employment contract or modalities of flexible working. Although the last word belongs to the employer, the procedure must be contained in a written document stating the proposals of each part and the reasons why the parties

were unable to reach an agreement. This document is to be sent to the Social Security who takes the charge of paying the total or partial remuneration of the employee laid off and controls the good faith in the bargaining procedures (art. 300 CTP). The Labour Inspectorate will accompany the procedure and re-examine the reasons underpinning it every three months (art.307CTP).

In the event that the contract is suspended by an Act of God, there are no consultation procedures to be followed.

In the event that the contract is suspended in the interest of the employer, he must simply inform the employee representatives or the employees directly, who may issue an opinion concerning the subject. There are no consultation or bargaining procedures envisaged (art.311CTP). Despite this, the employer is subject to a number of constraints during the suspension such as the prohibition to distribute profits or to remunerate the managers (art. 313CTP). The objective is to discourage at the maximum the use of this procedure.

There is also an important procedure in situations of collective redundancies. If the employer wishes to undertake a collective redundancy he must send a document stating the reasons and the workers affected to the works council, trade union sections or the workers themselves (who may elect a representative) (art.360CTP). This stage is followed by a consultative procedure that the law classifies as a bargaining procedure; the employer must bargain the redundancies with the employee representatives, in particular the reasons for the impossibility of alternative measures, which must all be contained in a written document (art.361CTP). The Labour Inspectorate intervenes in the conditions laid down in the Collective Redundancies Directive.⁶²⁸

There is equally anecdotic evidence of a certain diffusion of the improvement of the information and communication channels within Portuguese companies outside statutory procedures. In a survey conducted by the Ministry of Labour in 2006, circa 78% of employees stated that they had regular talks with the management and that they were inquired on the reasons capable of increasing their productivity albeit only 48% said that they felt that

⁶²⁸ For these procedures, see Gomes, J. V. (2007). Direito do Trabalho - relações individuais. Porto, Coimbra.

they had an actual impact. The reasons behind these numbers are connected with the Portuguese reality. The majority of companies are small companies with a small number of employees and therefore there are informal communication channels with the workforce based upon personal relationships; a daily walk through the company and an inquiry to the employees as a monitoring mechanism of their performance may serve as an indirect means of implementing an information and consultation procedure outside rigid statutory frameworks. The absence of a real pressure is connected with the strong managerialist conception of the company in Southern European countries where the company is regarded as the personal property of the manager who is unaccountable to anyone but himself. There are equally figures stating an increase in direct forms of employee participation such as lean production and other anthropomorphic forms of labour organisation (which already account for 54% of Portuguese companies) that is capable of increasing levels of employee participation and social dialogue but always outside a statutory framework. These are flexible forms of social dialogue and labour organisation that are capable of facilitating restructuring within companies.⁶²⁹

These two examples reveal that there is equally evidence in Portugal of an increase in the proceduralisation of restructuring, albeit made essentially by the law and indirect forms of participation, leaving the social partners aside. The requirement of the participation of the workforce in situations of suspension of the labour contract seems to be intended to make employees aware of the situation of the undertaking and encourage them to assume a more direct form of participation to fight the entrepreneurial crisis and avoid the redundancies. This is a proactive means of dealing with a crisis that encourages employee involvement and the sharing of information between both parties. In addition, there are several informal procedures for the exchange of information between the management and the rank and file therefore encouraging social dialogue at the level of the company. These procedures are purely informal and made outside any binding duty. Although these procedures exist, the general perception is that employees have little or no impact in the conformation of the workplace and that the managerial prerogative is left untouched. A wishful

⁶²⁹ Ministério do Trabalho e da Solidariedade Social (2006). Livro Verde sobre as Relações Laborais.

thinking would hope to replicate the British example in Portugal and hope that these informal channels of communication between employers and employees would have the reflexive effect of encouraging more active forms of participation. Only the future will tell but for the time being it is already a great conquest that employers are increasingly entering into dialogue with the employees and showing receptivity to more active forms of participation.

(a.5) Conclusion

this analysis of the implementation of procedural agreements in each one of the jurisdictions under study may allow us to put forward some conclusions. The purpose and objective of the procedural agreements is to lay down the formalities to be observed in certain restructuring procedures in order to avoid the externalisation of social conflicts into the courts or industrial action and allow the implementation of restructuring in a quick and efficient manner. These agreements presuppose two things: they presuppose an employee adhesion to the need of restructuring and a willingness of the management to engage into dialogue in order to find the best solution or to minimize its consequences. The best means to achieve this is by means of the improvement of the communication channels within the company; this will make employees aware of the forthcoming restructuring, reduce the agency costs that information gaps would provoke between managers and employees and allow employees to collaborate with the management in order to design the necessary anticipatory measures.

Procedural agreements in France are fundamentally connected to collective redundancies: the law encourages the parties to bargain their own agreements on the procedures to be observed in those cases and applies the statutory regulation only subsidiarily. This focus on self-regulation has a very precise scope: the self-regulation and the necessary anticipatory measures provided for in the law depend of the improvement of the communication channels between the employer and the employees; this improvement and the employees' willingness to collaborate in order to avoid redundancies is perhaps capable of giving birth reflexively to a new system of industrial relations based upon a more collaborative approach with the management; employees may use the information at their disposal in order to act more preventively and avoid

restructurings or at least minimise their consequences to the greatest extent possible.

This seems to be the situation in Germany. The conventions for the protection against rationalisation are not only used in situations of redundancies (although it is in those situations that they have their greatest expression) but in all situations capable of affecting the interests of the employees to a great extent such as the introduction of new work procedures or modifications in the organisation of companies. Although many of these measures fit within the co-determination powers of the works councils, the Betriebsräte decided to require union assistance in the performance of their role. Although the potential scope of application is larger than the one found in the method agreements, the formula is the same: rationalisation agreements are underpinned in the improvement of the channels of communication between employers and employees and in the search for anticipatory measures in collective agreements in order to avoid or minimise redundancies and their consequences. This leads to a more pro-active role by the employee representatives with a greater focus on the involvement at the company and cooperating actively in restructuring procedures in order to boost the competitiveness of the company.

The experience with procedural agreements in the UK was remarkable. The new-style agreements and the implementation of Directive 2002/14 in the UK seem to be clear indications of a new style and experience with collective bargaining which focus on a company-specific cooperative approach based upon employee representation within the company. The setting of employee representative bodies adapted to the specific needs of the company, the introduction of no-strike clauses and voluntary interest conciliation mechanisms, the improvement of communication channels by voluntary means and the particular duties of information and consultation imposed by Directive 2002/14 seem to be clear indications of the development of a new culture of collective bargaining underpinned in company-level social dialogue, a cooperative approach to restructurings and anticipation of change in order to contribute more actively to the competitiveness of companies.

Portugal also presented some evidence of the development of these agreements. The procedural regulation of conflicts of interest was seen as positive by the legislator; the lawmaker decided to assume into its own hands

the role of providing unilaterally for the procedure. The most prominent example is the procedure for *lay-offs* (that might be used in a variety of situations) in which the legislator intended to create incentives for a voluntary conciliation of interests in times of entrepreneurial crisis. If the company entered into an entrepreneurial crisis and the employer anticipated that collective redundancies could be necessary, it could use a preliminary procedure for layoffs that had to be bargaining with employee representatives. This ensured the improvement of communication channels between the management and the workforce and the engagement of employees in the management of the crisis within companies. Anecdotal evidence suggests that communication channels seem to be improving in Portugal albeit at the margin of the law and with weak results concerning the concrete possibilities of influencing the workplace.

The conclusion that may be drawn from these procedural agreements may be summoned in three principles: (a) the acceptance by managers and employees of the need to bargain in order to achieve the necessary restructurings (whether or not leading to redundancies), (b) the improvement of communication channels within the company in order to conquer employee adhesion and prepare the necessary anticipatory measures and (c) a cooperative and company-based approach to industrial relations.

5.2.3.2.3 Anticipatory agreements

The last type of innovative agreements that each country seems to have been developing consists in a new type of agreements that go beyond the traditional function of regulating wages and professional careers and the management of crisis situations towards an active involvement of the employees in the competitiveness of the company. These agreements may be named as “*anticipatory agreements*” because they are underpinned in a common commitment to ensure the prosperity of the company. They may be used both in prosperous and ailing companies because their function is to engage the employees more actively in the promotion of the competitiveness of the company. The legal and industrial relations literature has been studying these agreements and they have been naming them under the umbrella term “*partnership agreements*”. The various definitions that have been proposed for these agreements may assist us in understanding their precise reach. One definition was proposed by Frege - who coined them as “*partnership agreements*” and goes as follows:

*[Partnership agreements are] a **participatory process** leading to **high-trust**, **cooperation** and **compromise** between management and labour leading to the **engagement** of employees in the success of the company – instead of simply demanding more pay and better working conditions – and to their active involvement as **stakeholders** in the policy of the company.*⁶³⁰

Another definition that may be found at the Eurofound website, which conducted a comparative study of this type of agreements and defined partnership agreements as:

***Partnership** is an active relationship based on the recognition of a **common interest** to secure the **competitiveness**, **viability** and **prosperity** of the enterprise. It involves a continuing **commitment** by employees to improvements in **quality** and **efficiency**; and the acceptance by employers of employees as **stakeholders** with rights and interests to be considered in the context of major decisions affecting their employment.*

⁶³⁰ Frege, C. M. (2002). "A critical assessment of the theoretical and empirical research on German works councils." *British Journal of Industrial Relations* **40**(2): 221-248.

*Partnership involves a **common ownership** of the resolution of challenges, involving the **direct participation** of employees/representatives and an investment in their **training, development** and **working environment**.* ⁶³¹

These definitions may allow us to extract some preliminary conclusions concerning the key characteristics of these agreements. Partnership agreements consist in a shared responsibility for business efficiency underpinned in employment security and flexible working. Their advocates claim that they represent a modernisation of industrial relations that goes beyond the adversarialism of the period that covered 1950-1970 and the managerialism and fight against unionism that characterised most of the 1980-1990. The majority of these partnership agreements have the improvement of business performance in a viable and sustainable form as their main goal; they are underpinned in sound relationships with the representatives of the employees (whether union or elective) and seek organisational arrangements and the improvement of the sharing of information between management and employee representatives as the main form of boosting the performance of the company. The organisational arrangements that partnership agreements normally regard as the most appropriate for the fulfilment of their goals consist in (a) teamworking and the reduction of hierarchies, (b) flexible working methods and pay dependent of results and productivity, (c) employment security in consideration for the flexibility and commitment to the success of the company and (d) conflict solving mechanisms based on consensus and an avoidance of the courts. These are, as we may observe, all elements of the philosophy of lean production that mandates a decentralisation of decision-making towards the lower levels of the hierarchy, teamworking and the elimination of the division of tasks and employment security in exchange for flexibility. Partnership agreements consist in the involvement of the social partners in the implementation of this working philosophy. ⁶³²

Each country reveals some experience with partnership agreements because there is evidence of agreements containing all these elements, although their precise implementation varies in accordance with the legal

⁶³¹ Sheehan, B. (2000). "Partnership Agreements may Point the Way Forward." from <http://www.eurofound.europa.eu/eiro/2000/01/feature/ie0001204f.htm>.

⁶³² Terry, M. (1999). "Assessing the significance of partnership agreements." from <http://www.eurofound.europa.eu/eiro/1999/07/feature/uk9907214f.htm>.

system; whereas in some countries partnership agreements are clearly proactive in the sense of making a forward planning in others there is a more reactive dimension without forgetting the future reorganisation of the company. The following lines will attempt to demonstrate to which extent each country has been developing this kind of agreements and their precise content.

(a) Germany – Germany has been experiencing over the last few years a considerable expansion of a new type of agreements that became known as “*pacts for employment and competitiveness*” (*Betriebliche Bündnisse für Arbeit und Wettbewerbsfähigkeit*). These agreements come in the line of the process of decentralisation of collective bargaining that this chapter has been attempting to describe. Collective agreements seem to be increasingly moving towards the level of the company in the sense of achieving a more company-friendly (*Betriebsnäher*) Tarifpolitik. Pacts for employment and competitiveness differ from the previous types of agreements analysed because their purpose is not restricted to dealing with a crisis situation or to agree on a procedure for restructuring (although they may be used in these cases). These pacts have a much wider agenda that is focused on overcoming the common problems facing both the management and the workforce. The most complete definition came in the words of Seifert and Massa-Wirth, who defined these agreements as:

*Mutual accords between management and workforce representatives that resolve company-specific problems related to employment and competition. Works councils cooperate in order to cut costs and boost productivity. In return, the employers generally promise to forgo planned dismissals, protect threatened jobs or even to create additional ones and to preserve or even expand the production site affected.*⁶³³

These agreements knew a considerable expansion during the 1990s, a period in which they established themselves as a common practice in German companies. The particular characteristic of these agreements lays in the fact that the parties to the agreement made reciprocal concessions (with or without the approval of the trade union) in order to safeguard the jobs and boost the competitiveness of the company. The proof that these agreements were

⁶³³ Seifert, H. and H. Massa-Wirth (2005). "Pacts for employment and competitiveness in Germany." *Industrial Relations Journal* 36(3): 217-240.

underpinned not only on the willingness of the employee representatives but in particular of the unions to overcome common problems lay in the fact that the majority of the themes dealt in them did not fit within the co-determination powers of the works council but on the *Direktionsrecht* of the employer or the regulatory powers of the parties to the collective agreements. The competences bargained – in particular those from the employer's side – were not enforceable but both parties assumed a compromise to act as if they were. This flexibility outside the boundaries of the law and the mutual compromise of both parties to solve common problems turned these agreements into one of the most important regulatory means of employment relations during the 1990s and reflected the structural transformations that companies were subject to. These agreements deepened the bargaining agenda, reflected the acknowledgement of the fact that intensifying competition required the management and the workforce to minimise costs and promote workforce cooperation for continuous improvement and presented numerous advantages to both parties: for the management board, it presented the advantage of offering it an opportunity to reduce costs, improve flexibility and change the culture of the organisation in the face of increasing competitive pressures; for employee representatives, it offered them the opportunity to minimise job losses and strengthen their role in company decision-making; for both parties, it encourage the participation of both in the decision making procedures within the company in order to enforce a serious partnership approach.⁶³⁴

The investigation on the German Pacts for Employment and Competitiveness has devised a classification into two main types that may be subdivided into four subtypes. The main types are adaptation pacts and prevention pacts; adaptation pacts may be divided in (a) conventions for the guarantee of labour posts with a reduction in wages and (b) conventions for work redistribution; investment pacts may be classified as (c) conventions for investment with a reduction in wages and (d) conventions for productivity boosting investments.

⁶³⁴ Freyssinet, J., H. Krieger, et al. (2005). Pacts for Employment and Competitiveness, European Foundation for the Improvement of Living and Working Conditions.

(a) adaptation pacts

(a.1) conventions for the guarantee of labour posts with a reduction in wages

(a-2) conventions for the work redistribution

(b) investment pacts

(b.1) conventions for investment with a reduction in wages

(b.2) conventions for productivity boosting investment

It is worth viewing each one of these conventions in detail. Adaptation pacts consist in pacts bargained in situations in which the company faces serious economic problems (such as insufficient product demand or capital shortages). Companies react by proposing measures to reduce labour costs and make the necessary investments to overcome the situation of crisis and prevent its re-appearance in the future. They may consist in two modalities: (a) conventions for the guarantee of labour posts with a reduction in wages (*Lohnsenkende Beschäftigungsvereinbarung*) or (b) conventions for work redistribution (*Arbeitsumverteilende Beschäftigungsvereinbarung*). The former type consists in agreements providing for a waiving of wages in exchange for the guarantee of the maintenance of the labour posts. It consists in a form of worker solidarity in which the employees forgo temporarily a part of their salary in exchange for the maintenance of the labour posts in order to ensure the survival of the company. The latter type was made popular by means of the “*Volkswagen agreement*” in 1993 and consists in the avoidance of a collective redundancy or other types of rationalisation by means of the division of the shrinking volume of work by all the employees. The employee concessions consist mostly in a reduction of working time (shorter working days or working weeks) often combined with complementary measures of flexibilisation. The redistribution of work may equally be performed by means of a geographical and/or functional flexibilisation of the operation of work.⁶³⁵

Investment pacts consist in a distinct type of agreement. They consist in worker concessions not with the purpose of maintaining their labour posts but with the purpose of boosting the productivity of the company. They correspond more precisely to the partnership agreements mentioned above because the

⁶³⁵ Streeck, W. and B. Rehder (2003). Der Flächentarifvertrag: Krise, Stabilität und Wandel Max Planck Institute für Gesellschaftsforschung, Seifert, H. and H. Massa-Wirth (2005). "Pacts for employment and competitiveness in Germany." *Industrial Relations Journal* 36(3): 217-240.

concessions by the employees are not made with the direct purpose of maintaining their labour posts and avoiding redundancies but with the purpose of boosting the competitiveness of the company. There are two types of these agreements: (a) conventions for investment with a reduction in wages (*Lohsenkende Investitionsvereinbarung*) and (b) conventions for productivity boosting investments (*Produktivitätsfördernde Investitionsvereinbarung*). The former type consists in a modality of agreements that developed in Europe in the last part of the 1980s and early 1990s. This type of agreements is characterised by wage concessions by the employees in exchange for investments in the company that are destined to maintain production lines or to improve the productivity or the totality or of part of the company. They reveal a more active commitment of the employees into the success of the company as well as a compromise by managers to apply the sacrifices of the employees in the development of the company as a whole that will bring about benefits to the company as a whole – managers, shareholders and employees. The latter type consists in a modality of agreements that is not connected to the concessions of the employees but with the improvement of their productivity. The objective of the agreement is not to reduce the costs of labour to remain competitive but to increase the productivity of the company. These agreements normally consist in measures to flexibilise the working time, connect wages to productivity, adopt forms of organisation of work that are bringing an added value to the productivity of the company (in particular the introduction of lean production with employee assistance), among other measures. The purpose of the agreements is clearly pro-active in the sense of engaging employees in making the company more competitive and not simply requiring sacrifices in order to ensure its survival.⁶³⁶

A simple and synthetic reading of these kinds of agreements may allow us to extract some preliminary conclusions regarding the pacts for employment and competitiveness in Germany. Firstly, all but one of these pacts depend on waiving of benefits by the employees, often provided for in collective agreements, in exchange for other benefits. This is precisely what occurred in

⁶³⁶ Seifert, H. and H. Massa-Wirth (2005). "Pacts for employment and competitiveness in Germany." *Industrial Relations Journal* 36(3): 217-240. Berthold, N., B. M., et al. (2003). "Betriebliche Bündnisse für Arbeit. Eine empirische Untersuchung für den deutschen Maschinen- und Anlagenbau." *Wissenschaftliche Beiträge des Lehrstuhls für Volkswirtschaftslehre, Wirtschaftsordnung und Sozialpolitik* 68.

the Burda-Viessman-Holzmann cases commented above; the former pages have equally described the means by which the courts and the trade unions have been providing these agreements with a binding effect or – at least – exempting them from the barrier effect of §77(3)BVG. This is extremely important because this reveals that partnership agreements correspond to the reinforcement of the powers of the company level actors that we referred in the former pages and because they are often coupled with other kinds of agreements – flexibilisation agreements – in order to become effective and in conformity with the law. This coordination between partnership agreements and flexibilisation agreements (in particular single-employer agreements and opening clauses) also has an added advantage – it ensures that the use of the possibilities of deviation is made within the limits laid out in the collective agreements and the monitoring mechanisms guarantee the truthfulness of the reasons laid out for the use of the agreements and the possibilities of deviation. Secondly, the use of these agreements also reveals that the deviation from the standards laid down in collective agreements is not always a “*least harmful solution*” and that the deviation may correspond to a genuine interest of the workforce in the sense that today’s sacrifices may be tomorrow’s gains. That is the reason why some legal thinking claims that these agreements do not undermine but correct the standards laid down in collective agreements. Thirdly, these agreements may equally justify the insertion of some clauses in collective agreements; for instance, conventions for investments with a reduction in wages may justify increases in the wages laid down in collective agreements because part of them will serve the purposes of the competitiveness of the company; opening clauses in the subjects of working time and professional careers (delegating them towards the level of the company as far as possible) may serve the purposes of adaptation agreements (in particular those that aim at work redistribution, which often presupposes the violation of the professional careers laid down in the collective agreement).⁶³⁷

⁶³⁷ The majority of the literature concerning the *Betriebliche Bündnisse für Arbeit* deals with its conciliation with the flexibilisation agreements described above. See the interesting articles of Robert, L. (2004). "Betriebliche Bündnisse für Arbeit versus Tarifautonomie?" *Neue Zeitschrift für Arbeitsrecht*(12): 633-640. Rieble, V. (1999). "Bündnis für Arbeit - "Dritter weg" oder Sackgasse?" *Recht der Arbeit* 52(3): 169-177, Raab, T. (2004). "Betriebliche Bündnisse für Arbeit - königsweg aus der Beschäftigungskrise?" *Zeitschrift für Arbeitsrecht* 35(3): 371-403, Ehlers, M. (2008). "Personalkosten und Bündnisse für Arbeit." *Recht der Arbeit* 61(2): 81-91.

The most important thing to retain about these agreements is that they seem to be the example of a new decentralised culture of industrial relations betting upon a shared compromise of the employers and the employees in the success of the company. They rely on the management and the employee representatives within the company to assume jointly the responsibility for the success of the company and provide them with the necessary freedom to make the necessary arrangements. This shared compromise may demand some sacrifices – either monetary or in terms of flexibility - from the employee representatives; this must have some kind of control in order to avoid managerial abuses and downgrading of the standards of work. The best means to control these agreements are the so-called flexibilisation agreements mentioned above; these agreements are capable of providing both the necessary margin of freedom of the parties to bargain the best arrangements to boost the competitiveness of the company and the necessary limits and monitoring mechanisms to avoid abuses. This is the best means for the trade unions to have some kind of control over the activities occurring in this new decentralised culture of collective bargaining.

(b) France – France has equally had some experiences with anticipatory agreements. Following the traditional French regulatory tradition, these agreements were introduced by law and came in the form of the employer's duty to bargain the manpower management in the undertaking. This duty was introduced in the Borloo Laws of 2005 and took the name of provisional management of employment and competences (GPEC – *Gestion Prévisionnelle des Emplois et des Compétences*) currently provided for in art.L2242-15CTF. This provision is of an illusory simplicity because its potential impact is far-reaching. Art.L2242-15 CTF simply states that in companies with more than 300 employees or companies and groups of companies of communitarian dimension employing at least 150 employees in France, the employer is obliged to engage every three years in a bargaining procedure concerning (a) the modalities of information and consultation of the works council on the strategy of the company and its foreseeable impact on employment and wages and (b) the enforcement of a procedure for the provisional management of manpower, which must contain the modalities of information of the works council and the assistance measures associated with them – in particular

training, validation of experience, evaluation of the competences and measures of professional and geographical mobility.

Before engaging into the content of the duty one must understand its evolution. The GPEC comes in the line of a series of measures that have been progressively adapted throughout the times by the French legislator in order to avoid brutal restructurings and attempt to manage the human resources of the company in a socially responsible form. The first reference came in the Law of 18th June 1966 concerning the information and consultation of the works council on measures having an impact in the generality of the workforce. This statute determined that the works councils should be informed and consulted before the employer undertook any measures having an impact on the volume and structure of the rank and file. This was followed by the national agreement of 10th February 1969 concerning security in employment, which declared that companies should take an active role in the policy of security in employment by making the best efforts to forecast the probable evolution of employment in the undertaking in order to set the basis of an employment policy to be contained in industry agreements; this was particularly important in restructuring operations in order to reduce unemployment and search for viable alternatives. The period that covered from 1970 to 1978 was particularly fruitful in the determination of a provisional management of employment; the social partners signed in 1974, in the aftermath of the oil shock, an annex to the national agreement of 1969 creating the concept of a social plan (that would become a law in 1986 and be the origin of the *Plan de Sauvegarde de L'emploi*) and the Chirac Government of 1975 introduced the duty to inform and consult the works council in cases of collective redundancies, implementing the first Collective Redundancies Directive. One should mention that although Chirac's regulation of collective redundancies also implied an administrative control of the procedure (mandating the consent of the Labour Inspectorate), few than 10% of the requirements to the Labour Inspectorate were refused; this meant that the focus was clearly on the information and consultation procedures of the works councils. The Auroux Laws of 1982 continued this trend by planting the seed of what became a major revolution in the French system of industrial relations and gave the definitive impetus to the current prevalence of company-level collective bargaining in France. The evolution of the French system since the Auroux Laws had been outlined above and will be not repeated here. The most

important thing to retain is that there is a long tradition of social management of restructuring operations in France in order to minimise the social impact of the procedures.⁶³⁸

The GPEC is not easy to define. The greatest difficulty with it consists in the fact that the GPEC is not originally an object of the law; it is more concerned with Human Resource Management than with a concrete statutory duty. The most complete definition of GPEC might have been provided by Thierry and Sauret who defined it as

*“the conception, enforcement and follow-up of coherent policies and action plans destined to reduce in an anticipated manner the differences between the needs of the company and its human resources (in terms of effectives and competences) in function of its strategic plan (or at least in function of medium term objectives) and implicating the employee in the framework of a project of professional evolution”.*⁶³⁹

This definition evidences the dynamic character of the duty: it consists in a procedure, a duty to engage in a bargaining in order to take advantage of the margin of manoeuvre opened by the law in managing the human resources of the company, planifying the evolution of employment in the undertaking and presenting mutually agreed solutions after having identified the problems of common concern to the employer and the employees. The best definition of the procedure might not be made by its origin but by its objective: to undertake an efficient management of the employment in the undertaking taking into account the competences held by the employees and the demands of the company; it consists in assisting today's employees to occupy tomorrow's jobs by providing them with precise analyses concerning the evolution of the activities, the consequences in terms of employment and the needs of human resources. The concepts underpinning this management are anticipation, competences and employees; the employers needs to communicate to the employees the foreseeable needs in terms of human resources, to acquaint them with its needs in terms of competences and collaborate with the employees in the management of the human resourced that best fits its needs. This procedure is the connecting element between the human resources, the needs of the

⁶³⁸ See the excellent sociologic study of Rouilleault, H. (2007). *Anticiper et concerter les mutations. Rapport sur l'obligation triennale de négocier*, Gouvernement Français - Ministère des Finances.

⁶³⁹ Thierry, D. and C. Sauret (1990). *La gestion prévisionnelle des emplois et des compétences*, L'Harmattan.

company and the transition from an individual towards a collective management of human resources. This is a true proceduralisation of the management of human resources in the sense that it contains a set of tools, models and a procedure. It is destined to enforce a set of practices intending to conceive and implement preventive actions destined to overcome the problems of adjustment in terms of human resources when faced with the internal and external constraints of the organisation.⁶⁴⁰

The GPEC has two dimensions: a substantive and a procedural. The substantial dimension appeals to the concrete object of the procedure. The procedure has three mandatory objects and an optional one. The mandatory objects consist in (a) the modalities of information and consultation of the works council on the strategy of the company and its likely impact on employment and wages, (b) the bargaining of the setting up of a device for the provisional management of jobs and competences and (c) the conditions for access and maintenance in employment and access to professional training by aged employees; the optional object consists in the agreement on a conventional procedure for the *plan de sauvegard de l'emploi*. It is worth viewing each one of these objects in detail.

The negotiation on the modalities of information of the works council is an original choice of the legislator. The works council enjoys several statutory rights to information and consultation on economic issues, the situation of employment in the undertaking among other issues (art.L2323-1CTF and ff.). The legislator decided to adopt the original solution of placing these statutory duties of the parties at the disposal of the employer and the employee representatives who will be entitled to bargain the most appropriate arrangements to fulfil those objectives. This is a very important issue because this not only means that the rights to information and consultation on issues directly concerning the workforce are to be directly negotiated between the parties concerned but also that the parties have a right to proceduralise the decision-making in the company and agree on a solution that best defends their interests; the parties assume responsibility for their own information and

⁶⁴⁰ Antonmattei, P.-H. (2007). "La gestion prévisionnelle des emplois et des compétences: un défi social, économique et juridique." *Droit Social*: 1-3, Igalens, J. (2007). "La GPEC: intérêts et limites pour la gestion du personnel." *Droit Social*: 1074-1080, Vivien, P. (2007). "Quelques réflexions sur la mise en oeuvre de la GPEC." *Droit Social*: 1093-1094.

consultation arrangements in a process somewhat similar to the Information and Consultation of Employees Regulations in the UK. This presupposes an assumption of responsibility by the parties of the best means to achieve the optimal outcome in terms of information and consultation.

The second mandatory object of the procedure (the plan for the GPEC) is the core of the regulations. The parties are asked to bargain a procedure within the company that will in reality amount to an agreed procedure for human resource management for a period of three years. This plan has three very important dimensions: firstly, it must be provisional in the sense of avoiding making the plan a reactive one and attempting to manage the competences within the company in a pro-active way; the procedure is provisional in the sense of being turned towards the future, of being an agreement on the management of human resources for a given future period (three years in principle); secondly, it must deal with the competences of the employees; the purpose is not to agree on the volume of the employment but in particular of the competences mobilised and developed within a working context, which competences the employees will need to acquire (if possible) to remain in the company or how should they manage to make the professional transition; the literature concerning the GPEC is almost unanimous regarding the content of this agreement: it should state the status-quo of the company, make an evaluation of the impact of the strategy of the company in terms of human resources and define the necessary measures to be implemented;⁶⁴¹ the geographical and professional mobility should equally be the object of a GPEC since it becomes the best means of ensuring mobility within the company and the necessary anticipatory or adaptation measures by the employees in order to safeguard that levels of employment within the company and provide the employee with a foreseeable development of its career; the final issue that is of considerable importance for the agreement consists in the measures for hiring and dismissing persons, in particular aged employees; the determinations of the conditions of hiring of persons helps the employees to understand the future development of the rank and file of the company and adopt the necessary anticipatory measures to cope with it; the determination of the conditions of dismissal helps to determine beforehand the conditions for

⁶⁴¹ Favennec-Héry, F. (2007). "La GPEC: l'environnement juridique." *Droit Social*: 1068-1073.

voluntary departures, makes employees aware of their destiny in the company and avoids social conflicts; the situation of the older workers is of particular importance because they are a particularly disadvantaged group; the plan should combine the social treatment of these workers with measures for professional training in order to facilitate their transition towards new jobs. This part of the most important element of the procedure because in reality it will amount to an agreed management of human resources in the company for a period of three years having into account the needs of the company and the capabilities of the employees; the employees will not be caught by surprise, will be acquainted with the evolution of the rank and file for the next three years and will have an opportunity to influence it by means of the duty to engage in a negotiation procedure with the management board.

The optional part of the plan consists in the possibility of agreeing on a PSE (*Plan for the Safeguard of Employment*) in the GPEC. This possibility raised severe discussions concerning the compatibility between the GPEC and the PSE; the main question was to know whether the GPEC was a preliminary state if the PSE; the doubt is more academic than real: as Rouilleault puts it in a very straightforward way both the GPEC and the PSE are mandatory for all companies (with more than 300 employees); the difference is that the GPEC is proactive (in the sense laid down in the European Law on the Participation of the Workforce, of looking towards the future and attempting to foresee the contingencies affecting the company) and the PSE is reactive (in the sense of attempting to provide an answer to a situation of crisis). They are not to be confused and the possibility of inserting a PSE in a GPEC is simply a natural consequence of the proactive character of this latter type of procedure; the parties would consider in their best interest to agree previously, outside the pressure of the redundancy, on the conditions for the collective redundancy to occur.⁶⁴²

⁶⁴² The literature concerning the GPEC is abundant. See Ibid, Igalens, J. (2007). "La GPEC: intérêts et limites pour la gestion du personnel." *Droit Social*: 1074-1080, Rouilleault, H. (2007). *Anticiper et concerter les mutations. Rapport sur l'obligation triennale de négocier*, Gouvernement Français - Ministère des Finances, Rouilleault, H. (2007). "Obligation triennale de négocier, où est-on?" *Droit Social*(9-10): 988-995, Vivien, P. (2007). "Quelques réflexions sur la mise en oeuvre de la GPEC." *Droit Social*: 1093-1094. Antonmattei, P.-H. (2007). "La gestion prévisionnelle des emplois et des compétences: un défi social, économique et juridique." *Droit Social*: 1-3, Neau-Leduc, C. (2007). "Les sanctions de la GPEC." *Droit Social*: 1081-1085.

The procedural dimension of the GPEC lays in the fact that – similarly to the method agreements – it consists in a voluntary procedure. The management of the human resources within the company became a duty of the employer and the employee representatives who had to bargain an agreement that safeguarded to the best possible extent their mutual interests. In a procedure similar to the one provided for in the Information and Consultation of Employees Regulations, the parties became free to determine the content and steps of the procedure to be followed in accordance with their needs and being bound only by the minimum content laid down in the law. This proceduralisation of the GPEC remembers the content of the proactive directives in the European Law of the Participation of the Workforce in which the parties were strongly encouraged to bargain their own voluntary agreements for information and consultation given the relative indeterminacy of the content of information and consultation and the underlying intention of encouraging a cooperative relationship between the parties.

This synthetic description of the content and procedure of the GPEC allows us to extract some preliminary conclusions regarding this legal instrument. The main characteristics of the partnership agreements outlined above consisted in an attempt to progressively engage employees as stakeholders and in their involvement in the decision-making procedures of the company by means of procedures for information and consultation that would align their interests with the management board and attempt to engage them in the promotion of the success of the company. The GPEC reveals all the characteristics of a partnership agreement: it is a procedural duty meaning that it does not lay down substantive solutions but rather attempts to encourage the parties to reach their own solutions by procedural means; it relies on information and consultation and attempts to promote the exchange of information between the management board and the rank and file of the company by providing them with the possibilities to develop their own arrangements in deviation of the law if necessary; the objective of the procedure consists in the progressive engagement of employees in the management of human resources in the company by making them acquainted with the needs of the company, providing them with an instrument to be able to influence that management and contribute more actively to the competitiveness of the company and engaging them more actively in the restructuring of the

business. The objective of the procedure seems to be to overcome the adversarial approach characteristic of French collective bargaining and evolve towards a more cooperative approach attempting to involve the employees as true stakeholders in the company. This is extremely important if we take into account two distinct dimensions: the progressive move towards a philosophy of “enlightened shareholder value” in French corporate governance and the increasing shareholder pressures demand a more cooperative relationship with the employees (the so-called insider/outsider conflict); it is equally an optimal means to introduce the philosophy of lean management in French companies because this working procedures rely fundamentally on the exchange of information between the management and the employees and the assumption of responsibilities by the employees in the promotion of the success of the company. The GPEC has all the possibilities of becoming in the future an important restructuring instrument for the competitiveness of French companies.⁶⁴³

(c) UK – the UK has equally exhibited some experience with anticipatory agreements within companies although the particular characteristics of the British model of industrial relations dictated the development of a distinct form of agreements and their relationship with the law. In addition, the evolution of partnerial forms of work organisation cannot be unbound from the objectives pursued recently by the New Labour Government elected in 1997, which attempted to set the basis for a new culture of industrial relations without putting in cause what was left of the principles of monism and voluntarism that underpinned the British system of collective bargaining.

The analysis of the institutional complementarities between the systems of corporate governance, firm organisation and collective bargaining made above outlined the fact that the monistic and adversarial characteristics of trade unions were complementary to a system in which managers were under a pressure to deliver results to the shareholders and in which the tayloristic system of work organisation emphasised the managerial prerogative by

⁶⁴³ For a general review of the reforms of collective agreements in France see Antonmattei, P.-H. (2009). "Quelques propos sur la promotion de l'accord d'entreprise." *Droit Social*(9/10): 883-885. Barthélemy, J. (2009). "Vers de nouvelles évolutions du droit de la négociation collective? ." *Droit Social*(8/10): 907-910, Morel, F. (2009). "La rénovation de la démocratie sociale: vers une société de dialogue." *Droit Social*(9/10): 885-886.

providing managers with the undisputed right to manage the best in the best interest of the shareholders. The fierce attacks to trade unionism undertaken during the 1980s by the Thatcher Government allowed for an extraordinary development of capital markets at the international level but failed to provide British companies with the necessary boost in competitiveness to become world players once again. The success of more cooperative forms of firm organisation by German and Japanese competitors led more and more British companies to search for viable alternatives to the traditional adversarial approach that characterised British industrial relations and attempt to promote more cooperative forms of firm organisation; the answer lay in human resource management strategies that have progressively been attempting to introduce more cooperative approaches within companies without questioning the managerial prerogative.⁶⁴⁴

The New Labour Government that took power in 1997 endorsed labour-management cooperation or partnership as an effective approach for improving economic performance. The Labour Government's primary industrial relations objective became to change the culture of work relations in and at work based on the assumption that efficiency and fairness are wholly compatible. The new culture needed to be based upon understanding and cooperation because it was recognised that the prosperity of each employer and employee was strongly dependent on the prosperity of all. This new model of human resource management focuses on the achievement of a particular role orientation on the part of the employees so that they are flexible, expansive in their perceptions and willing contributors to innovation. The best and most often quoted definition of this new role for the management and human resource management came in the words of Stephen Wood, who coined it as:

⁶⁴⁴ Deakin, S., Richard Hobbs, et al. (2001). Partnership, ownership and control: the impact of corporate governance on employment relations, ESCR Centre for Business Research, University of Cambridge, Collins, H. (2003). Employment Law, Oxford University Press.

*Partnership is a matter of employers having the right to ask employees to develop themselves in order to accept fresh responsibilities whilst they themselves must take responsibility for providing the context in which this can happen. In the terminology of the principal-agent theory, it is about employers having a concern for the employability of the employees and in so doing acting as an agent for their development and security.*⁶⁴⁵

This sentence deserves further explanation. Wood did not put in question the traditional supremacy of managerialism and the right of managers to decide what is best for the firm. Wood rather emphasises the need for workers to make commitments and adapt to the needs of their employer and its business by adopting a unitarian corporate culture: in the nomenclature of the contractarian conception of the firm, workers are to be considered as key stakeholders in the company whose collaboration is needed to promote more efficiently the success of the business. Their participation is to be achieved by means of integrative institutions (a proxy for employee participation mechanisms) which will enter into dialogue with the management, understand the needs of the business, propose and make arrangements on their possible contribution to promote it and then adopt the work procedure (the human resources management) towards the promotion of those specific goals. The bargaining should evolve from a distributive towards an integrative bargaining.

This new philosophy was welcomed by the Trade Union Congress, who committed itself to partnership as a new form of bargaining in a document issued in 1999 named *Partners for Progress: new unionism at the workplace*. This document identified the six principles underlying company-level industrial partnership, which consisted in: (a) a shared commitment to the success of the organisation; (b) a commitment by the employer to employment security in return for which the union agrees to a higher level of functional flexibility in the work place; (c) a renewed focus on the quality of working life, giving workers access to opportunities to improve their skills, focusing attention on improving job content and enriching the quality of work; (d) openness and a willingness to share information; (e) adding value – unions, workers and employers must see that partnership is delivering measurable improvements; and (f) a recognition

⁶⁴⁵ Wood, S. (2000). From voluntarism to partnership: a third way overview of the public policy debate in British industrial relations. *Legal Regulation of the Employment Relation*. H. Collins, P. L. Davies and R. Rideout, Kluwer Law International.

by both the union and employer that they each have different and legitimate interests.⁶⁴⁶

This approach raises a distinct question, which consists in the relationship between the law and this new philosophy of partnership. To which extent should law impose or encourage partnership. The question is hard to answer because the traditional British distrust of statutory regulation - completely opposed to the French tradition - in particular in the subject of industrial relations opposed from the first instance a direct imposition of partnership by statutory means. This does not mean however that the law does not influence partnership; the approach that has been followed by the British legislator seems to have been one of using the law as an encourager of partnership agreements without ever imposing their conclusions and much less their content. The main instruments that the British legislator has been using to create incentives to company-level social dialogue have been outlined in detail above and will only be mentioned briefly here. The first main important instrument comes in the statutory procedure for recognition; considering that the unions may achieve mandatory recognition for a period of three years and the employer had a duty to bargain wages, working time and holidays with the unions, there is the hope that this procedure will have the reflexive effect of encouraging a more proactive dialogue between the parties. Secondly, the creation of the workforce agreements and the ad hoc employee representation in situations of collective redundancies and transfers of undertakings have created an hybrid works council-type body in companies deprived of union recognition that is capable of bargaining directly with the employer some of the issues that concern them to the furthest extent. Finally, the particular technique of transposition of Directive 2002/14 in the Information and Consultation of Employees Regulations, which is strongly underpinned in the technique of reflexive law as a means of encouraging the parties to bargain the employee representation institutions and the information and consultation mechanisms that best fit their own specific needs, provided the parties with the necessary instruments to conciliate voluntarism with the requirements of the Directive. The combination of these instruments is particularly apt to the development of a

⁶⁴⁶ www.tuc.ork.uk/partnership/six_principles.cfm; Hudson, M., Suzanne Konzelmann, et al. (2002). Partnership in practice, ESRC Centre for Business Research, University of Cambridge.

partnerial approach to social dialogue at the level of the company. They reinforce the powers of the actors at the level of the company (with the possibility of union, non-union, joint and other forms of representation) and the information and consultation requirements provide them with sufficient flexibility to develop their own arrangements free from any statutory coercion and agree on the best mutually acceptable outcomes. This is a strong encouragement to industrial democracy and partnership because the main purpose of the law is to encourage the conclusion of agreements between the parties and a more permanent level of social dialogue within the company. This is the functioning of reflexive law at its best.⁶⁴⁷

The preliminary conclusion that one may extract from the approach to partnership agreements in the UK is that partnership cannot be imposed by the law (in particular in a system that still preserves voluntarism to some extent) but it may be encouraged by it. The main actors here are the human resource management departments that have been tailoring some innovative solutions to the competitive needs of companies. There is anecdotic evidence of concrete partnership arrangements that have been developed by the employer and employee representatives. These agreements have some common characteristics that consist in the following traits: (a) greater fluidity in job classifications and hierarchies, (b) indirect forms of supervision, (c) double-direction communication channels, (d) profit and performance related pay and (e) flexible employment/employability as job security.⁶⁴⁸ It is worth viewing each one of these elements in detail.

The greater fluidity in job classifications essentially appeals to the progressive elimination of hierarchies and the strict job classifications that characterised the fordist production regime. The classifications of jobs are becoming more and more open ended and employees are increasingly expected not to perform a predefined task but an indeterminate number of tasks that fits within its capabilities. This led to the regrouping of workers in groups of workers that exhibit names such as quality circles, just-in-time production, etc. These groups of workers are characterised by a lack of

⁶⁴⁷ Collins, H. (2003). Employment Law, Oxford University Press.

⁶⁴⁸ Collins, H. (2001). "Regulating the employment relation for competitiveness." Industrial Law Journal **30**: 17-46.

hierarchies and they are expected to contribute more actively in the performance of the task attributed to them. This amounts to a direct implementation of the philosophy of lean production.

The rearrangement of workers in working groups has also modified the monitoring mechanisms. The vertical direct monitoring mechanism that was characteristic of the fordist production regime is being increasingly substituted by indirect monitoring mechanisms with techniques such as peer-pressure (since the work of the group is evaluated as a whole, the remaining members of the group will monitor themselves in order to prevent shirking by any individual member), performance targets, appraisals of performance and financial measures of performance. The incentive to work hard and to prevent shirking does not come from penalties but from incentives.

The improvement of communication channels is an element of central importance. The extraction and exploitation of knowledge from the workforce requires new types of procedures and organisational arrangements. The firm has to create processes and systems through which the knowledge is shared and used productively. This implies the transmission of information from the management to the workforce, in order to allow them to adapt their work capabilities to the requirements of the company, but also from the workforce to the management, in order for the management to make the necessary arrangements to extract the most from the possibilities of the workforce. It is imperative to strengthen the free flows of information that bind the firm together.

The remuneration system is another element of central importance. The remuneration systems during fordism had been based upon fixed sums varying in accordance with professional category and seniority and there was an absolute protection of the wage. This system was typical of a rigid organisation in which the employee had no margin of manoeuvre based upon a conflicting hierarchy with the management hesitant to pay the labour cost. The cooperative approach to labour management depends on another type of remuneration system; since employees have greater autonomy in their work, it is normal and understandable that part of their remuneration is performance based because it intends to create incentives to increase the productivity of the workforce; on the other hand, profit-sharing schemes are equally common as it intends to make employees aware that they are equally part of the business, increasing their remunerations in times of gains and reducing it in times of

economic troubles. This is an integrative approach that intends to create incentives for value-creation and a more collaborative approach with the company.

The question of security in employment is another important issue. Security in employment during fordism was achieved by protecting the status of the worker. In a cooperative form of industrial relations, employment security can be achieved by two means: firstly, by means of flexibility in the workplace; secondly by means of employability. These two measures are destined to encourage the adaptation of the worker within the company and to flexibilise its performance of work while the second is destined to encourage employee adhesion to the company by providing it with the necessary knowledge to the employed elsewhere and ensure a successful professional transition.

The distinguishing feature of these agreements is that they are made voluntarily, independently of any legal coercion or command. The regulatory scheme for industrial relations simply intends to provide for a procedural framework to encourage the parties to bargain their own arrangements and reach the best optimal solutions. This is consistent with the philosophy of voluntarism that still prevails in British industrial relations according to which the parties are strongly encouraged to make their own arrangements for participation. On the other hand, anecdotic evidence from the study of the concrete agreements reveals that there is a strong connection between the use of these agreements and the implementation of the philosophy of lean production within companies. These are the conclusions that may be drawn from the study of partnership agreements in British law.

(d) Portugal – Portugal has equally exhibited some experiences with partnership agreements although the situation in Portugal is singular in some aspects. The Portuguese experience with partnership agreements has largely been made outside the law – although it has been often publicly praised by the Government – since it consists in a form of bargaining made outside the boundaries of the law and based upon purely voluntary agreements. The legal value of these agreements is extremely doubtful although they have been spreading. It consists in a form of social bargaining made outside the statutory procedures largely based upon a gentleman's agreement between the employer and the employee representatives.

Trade unions enjoy a monopoly of collective bargaining in Portugal because they are the only parties recognised by the law as legitimate to conclude collective agreements regulating collectively the conditions of work (art.2CTP). This means that works councils and the collectiveness of the employees of the company do not enjoy any collective bargaining capacity; there is no such thing as a “*workforce agreement*”, “*Betriebsvereinbarung*” or “*accord d’entreprise*” in Portuguese Law. Although works councils and employers have been making pressures throughout the years to introduce these kind of agreements in Portugal (named as “*acordos gerais de empresa*”), they have always met the most fierce opposition by the trade unions. Since the unionisation levels are low in the private sector and the majority of collective bargaining takes place at the industry level (and covering circa 80% of the workforce by means of the administrative procedures for extension), the trade unions oppose any kind of measure that might disturb their predominance at the industry level and never allowed for the introduction of these agreements into Portuguese law.⁶⁴⁹

The reality has proven distinct from the statutes. The Portuguese landscape of industrial relations has witnessed the expansion of a number of agreements made outside the law that came to be known as “*atypical agreements*” (a proxy for illegal agreements) concluded directly between the management and the workforce without the opposition of the unions, who refused to go to courts and challenge directly these agreements. These agreements first appeared in the period that covered from 1974-1990 in which there was a massive wave of nationalisations of the major companies in Portugal (until the mid-1980s) that was followed by another wave of privatisations and growth of stock markets (from the mid-1980s onwards). In addition to this wave of nationalisations and privatisations, there was equally an extensive industry-level restructuring of all companies (independently of the size) in order to adapt the productive units of the country to the accession to the European communities and the common market. Since the majority of the trade unions were politically compromised and were unable to provide an effective answer to these successive waves of massive restructurings, the employers and the employees took upon their own hands the duty to bargain

⁶⁴⁹ Social, M. d. T. e. d. S. (2008). Livro Branco sobre as Relações Laborais.

the best means of coping with these challenges and bargained a number of agreements that were the functional equivalent of workforce agreements (*Betriebsvereinbarungen*) with the works councils or the employees directly. These workforce agreements proved successful and currently they are extremely widespread across the industries taking the form of informal agreements with the workforce.⁶⁵⁰

European Law also had considerable influence in the spreading of these agreements. The Labour Code provides for information and consultation procedures in situations of collective redundancies, transfer of undertakings and lay-offs. The details of these procedures were outlined above and will not be repeated here. The most important thing to retain is that these in-company information and consultation procedures are destined to result in an agreement (although the agreement is not mandatory; there is a duty of means and not a duty of result) that has a very dubious legal value in Portuguese law because the labour code does not recognise it among its sources of labour law. The transposition of the EU Directives and the action of the lawmaker attempt to promote an agreement that has no place in the sources of labour law in Portugal. That is the reason why these agreements came to be known as atypical agreements.⁶⁵¹

The legal value of these atypical agreements is extremely dubious. There are three positions concerning the value of these agreements. One position considers them as a pre-constitutional form of collective bargaining that the Portuguese Constitution failed to recognise; since collective bargaining would be – like the family – a pre-constitutional phenomenon that the Constitution simply recognised, they had to fit within the constitutionally recognised freedom of coalition and right to collective bargaining and an interpretation of the law in accordance with the constitution had to recognise them legal value. They were socially typical but legally atypical. Another position recognises their validity and applied the old principle *tu paeter legem* (you suffer the consequences of your own law) considering that they were

⁶⁵⁰ Gomes, J. V. (2004). National Report Portugal. The evolving structure of collective bargaining in Europe 1990-2004. S. Sciarra. Florence, European Commission, University of Florence, Monteiro Fernandes, A. (2004). Direito do Trabalho, Almedina.

⁶⁵¹ Gomes, J. V. (2004). National Report Portugal. The evolving structure of collective bargaining in Europe 1990-2004. S. Sciarra. Florence, European Commission, University of Florence, Gomes, J. V. (2007). Direito do Trabalho - relações individuais. Porto, Coimbra.

unilateral engagements by the employer or the employee representatives and had to be recognised as valid by the law. A third position simply considered them invalid because they did not fit within the statutorily recognised sources of labour law.⁶⁵²

There are several examples of these agreements and only some of them are documented. An analysis is extremely difficult because these negotiations take place fundamentally at an informal basis and they are difficult to control. The most prominent example is the one of AutoEuropa, the Volkswagen production unit located in Palmela, Portugal. As a preliminary word, one must say that AutoEuropa alone represents 8% of Portuguese exports and 2% of Portuguese GDP. The German management at AutoEuropa has implemented since the beginning of the production unit a German style system of industrial relations largely based upon direct dialogue and consensus with the workforce. One example was the agreement signed in 2003; the works council agreed to forgo a pay rise in order to cope with the crisis that was threatening the existence of the plant and the maintenance of the employment levels and exchange the reduced remuneration for non-working days or a complete halt of the production of the factory during some periods in time in order to maintain its existence.⁶⁵³ The management and the works council also signed in 2006 another agreement in order to cut labour costs and increase flexibility; the terms of the agreement stated that there would be a phased wage increase in a period of two years that would amount to a total increase of 5%; in exchange for this increase in normal working time, the remuneration for extraordinary working hours would be decreased from 200% to 100%. In addition, the workers also agreed to undergo training measures in order to increase their efficiency levels and flexibility in performing several tasks. This agreement ensured the maintenance of the factory in Palmela for another period of 10 years and the creation of an additional 3000 jobs (direct and indirect).⁶⁵⁴

These agreements had been widely praised by the successive Portuguese Governments – Left and Right – as an example of the path to

⁶⁵² Nunes de Carvalho, A. (1996). "Primeiras notas sobre a contratação colectiva atípica." *Revista de Direito e de Estudos Sociais* 14: 9-36.

⁶⁵³ <http://www.eurofound.europa.eu/eiro/2003/06/inbrief/pt0306101n.htm>

⁶⁵⁴ <http://www.eurofound.europa.eu/eiro/2006/12/articles/pt0612039i.htm>

follow in industrial relations and the possibility of an agreement between the management and the workforce and the overcoming of the adversarial approach that characterised Portuguese industrial relations. Despite the success of the agreements, the social partners have persistently refused to accept their expansion into other companies (although they have refrained from challenging AutoEuropa in the courts) and the introduction of workforce agreements in Portugal. This does not mean that they do not exist however but merely that they exist at the margin of the law; in the words of Nunes de Carvalho, it is a socially typical but legally atypical phenomenon.

5.2.3 Conclusion

This short overview of the content of anticipatory agreements may allow us to extract some comparative conclusions. These agreements seem to be underpinned in five common characteristics that determine their content. Firstly, these agreements are mainly procedural in the sense of not laying out the content of the partnership agreement but mainly providing the parties with the necessary legal framework to reach that agreement; this is particularly evident in France (with the GPEC) and the UK (in which the statutory procedures refrain to the fullest extent from dictating substantive solutions) where these agreements are essentially procedural and relying on a technique of reflexive law. Secondly, these procedures are heavily linked to human resource management; they seem to be intended to manage the human resources in the company in a proactive and efficient form and evolve from a distributive towards an integrative bargaining; the only exception here seem to be Germany, where the agreements appear to be linked more to flexibility agreements than to human resource management; this may be explained by the strong co-determination powers of the Betriebsrat in the management of human resources in the workplace, which makes this dimension of the agreements appear less important. Thirdly, these agreements are equally strongly underpinned in the philosophy of lean management with an emphasis on decentralisation of decision-making procedures, progressive elimination of hierarchies, flexibility in the workplace and the reinforcement of the dual-channels of information in the workplace in order to reduce information asymmetries. Finally, these agreements equally appear to exhibit a philosophy

of concession bargaining (particularly in Germany, where they are linked to flexibilisation agreements) in which the employees make concessions to the firm in exchange for other types of benefits that the improvement of the competitiveness of the firm may bring them in the future. These five characteristics may allow us to understand the reach of the definition of “*partnership agreements*” made at the beginning of this session: they consist in the most complete form of recognition of employees as true stakeholders of the company (within a contractarian conception of the firm) and the mechanisms devised in them appear to be designed to reduce the agency costs that occur between the management and the workforce in the face of increasing shareholder and market pressure (the so-called insider/outsider conflict) and are designed to integrate employees more fully into the firm and align their interests with the competitive interests of the firm; the five characteristics assigned to them above are the means the best achieve these objectives.

5.2.4 Comparative perspectives

One may attempt to put forward at this point some conclusions concerning the evolution of collective bargaining. The former chapters of this thesis attempted to outline the institutional complementarities that appear to exist between the regulation of employee representation (including collective bargaining) in each jurisdiction, the prevailing pattern of corporate governance and the overall economic conditions. Collective bargaining developed in Continental Europe the context of a system characterised by a macro-economic environment underpinned in keynesianist ideals, fordist production structures and concentrated relational governance structures. The function of collective bargaining was to pacify the labour market, avoid competition in terms of labour costs between companies and allow the retention of profits to finance the expansion of the company. The only exception was the UK, a country where the dispersed ownership patterns provided managers with a considerable degree of autonomy to run the business and decentralised collective bargaining was a complementary part of this system of insulation from shareholder pressure. The situation modified considerably from the 1980s onwards: the expiry of the previous model of growth led governments to rearrange their macro-economic environments towards monetarist policies. This had a

considerable impact in the governance of companies. The economic cycle became increasingly unstable, the market capitalisation of companies expanded considerably, institutional investors (a proxy for investment funds) entered the stock markets with the purpose of influencing the governance of listed companies, the preferred growth technique transitioned from growth through expansion to growth through innovation, companies became increasingly governed in terms of their capacity to generate profits and a widespread movement of decentralisation of companies began to take place under the ideals of lean management. This placed a considerable degree of pressure upon managers in all jurisdictions to deliver shareholder value as a standard of performance. This had to have an impact on the existing models of collective bargaining, which had to adapt to the new demands.

The new types of agreements may be considered as an evolution of the structures of collective bargaining in order to deal with this new macro-economic environment, governance of companies and organisation of production. The significance of the agreements must be seen within their due context - because the structures of collective bargaining vary widely - but they may be boldly subsumed to three distinct types of agreements: flexibilisation agreements, procedural agreements and anticipatory agreements.

Flexibilisation agreements consist in a modality of agreements destined to flexibilise the working conditions at the level of the company. They focus mainly in the subjects of wages and working time and are prominently used as a means of adapting the working time to the demands of the customers and the wages to the economic fluctuations in order to avoid redundancies or bankruptcies. They have a direct connection to the post-1970 macro-economic environment - characterised by an unstable economy, fierce international competition, shareholder pressure to deliver financial results and widespread restructuring of production - and attempt to align the interests of managers and employees in order to ensure the competitiveness and/or survival of the company. These agreements pose a considerable danger because they may be used as a means of undermining the collectively agreed conditions of work. That is the reason why their application was surrounded by precautions mainly in the form of a requirement of approval of the trade unions in their existence and application. They represent nonetheless an important instrument of

flexibility while attempting to safeguard the interests of employees in a new unstable world.

Procedural agreements perform a distinct function. They intend to improve the communication channels between the management and workforce within the company. The purpose and objective of the procedural agreements is to lay down the formalities to be observed in certain restructuring procedures in order to avoid the externalisation of social conflicts into the courts or industrial action and allow the implementation of restructuring in a quick and efficient manner. These agreements presuppose two things: they presuppose an employee adhesion to the need of restructuring and a willingness of the management to engage into dialogue in order to find the best solution or to minimise its consequences. They allow for a constant adaptation of companies to the demands of stakeholders or to the instability of the macro-economic environment and promote the competitiveness of companies while minimising the social consequences.

Anticipatory agreements consist in the final stage of development of the new types of collective agreements. These are procedural agreements, heavily linked to human resource management, that bet upon lean management, decentralisation and concession bargaining as a means of reducing the agency costs of managers/shareholders vis-à-vis employees in the firm and attempt to engage them into the success of the firm by means of flexible work procedures, in-company social dialogue and constantly readapting compromises. They may consist in the most complete form of recognition of employees as true stakeholders of the company.

These diverse types of agreements may be considered as a development and readaptation of the traditional structures of collective bargaining to the new macro-economic environment and corporate governance structures. They appear to recognise employees as stakeholders of the company and attempt to engage them in the success of the company by means of flexibilising their wages and working time in order to allow the company to adapt to economic fluctuations and the demands of stakeholders, improve the communication channels in order to allow the company to engage in a successful restructuring with a minimum of social consequences and engage employees in the success of the company by means of the improvement of the communication channels between management and employees, a human

resource management underpinned in lean management and decentralisation and concession bargaining in order to make the company more competitive.

5.3. Evolution of Employee Representation and SMC: short comparative remarks

This overview of the evolution of employee representation and collective bargaining cannot forget an overview – necessarily short – concerning the evolution of employee representation in small and medium companies. Several of the measures that were described above are of particular importance to small and medium companies and their role should be righteously stressed.

The European definition of a small and medium enterprise considers it as an enterprise below the thresholds of 50 (small) or 250 (medium) employees.⁶⁵⁵ These companies are not simply large companies in a small scale. Social dialogue in these types of companies is greatly facilitated because the (relatively) small thresholds of employees and the direct dialogue between the management layers and the rank and file – often by means of a simple routine walk along the production unit - facilitates direct flows of information between the employees and the management independently of institutional forms of representation. This is particularly important for companies whose main activity is to work as contractors for major companies in accordance with the philosophy of lean management. These companies are under an increasing pressure and preponderance from an external contractor that in reality acts as a major shareholder of the company (because the financial survival of the company is dependent of a relatively small number of clients) and they are under an increasing demand for flexibility – particularly in the subject of working time – in order to accommodate the demands of its major overwhelming stakeholder. This places a great deal of pressure upon these small companies because they need to flexibilise their production to maintain their main client. Since union implementation in these companies is generally feeble there is a great deal of illegal activities in these companies to the detriment of employees. That was the reason why nearly all the jurisdictions in this study have attempted to introduce measures to facilitate the functioning of small and medium companies and allow them to remain competitive.

⁶⁵⁵ European Commission, Recommendation n°. 2003/361/EC: SME definition.

The measures that the majority of the jurisdictions adopted were fundamentally in the form of derogatory agreements in the subject of working time. The objective of these agreements was to provide these companies with sufficient flexibility in working time to accommodate their productive procedures to the demands of their major stakeholders without endangering their competitive position and safeguarding the position of the employees. The foremost example is the UK with the introduction of the derogatory agreements in the subject of working time. These workforce agreements, analysed above, were specifically designed for small companies that needed to adapt constantly to fluctuations in the demands. Since union implementation in those companies was usually feeble, the legislator provided for the setting up of “*works council*” type bodies that would bargain the derogations to the procedure (which were latter subject to an administrative approval). Portugal exhibited the same tendency. The recent reform in working time with the creation of working time accounts (*bancos de horas*) that allows companies to deviate from the standards laid down in collective agreements under certain conditions was designed precisely to allow small companies to adapt within an easily controlled procedure to the fluctuations in demand and the requirements of their major clients. This was particularly welcomed in Portugal as a large proportion of Portuguese small companies work as subcontractors to companies located abroad. The same thing goes for Germany: the opening clauses contained in German collective agreements were particularly welcomed by small companies because this provided them once again with sufficient flexibility in order to remain competitive in international markets while preventing a general movement of escape from collective agreements.

The French case deserves a special paragraph. The evolution of French Labour Law outlined above attempted to describe how the progressive reinforcement of the powers of the actors at the level of the company was accompanied with the progressive development of derogatory agreements up to the point that the company-level is increasingly becoming the main focus of bargaining in France and the industry level is becoming wholly subsidiary. The evolution of the powers of the actors intended to create incentives for employee representation that had both an elective and a designate legitimacy: the priority given to the actors in the signing of derogatory agreements is the following: (1) shop stewards (who are primarily elected by the trade union among the

candidates to the elections), (2) staff-delegates holding a union mandate or (3) staff-delegates but subject to the approval of the employees by means of a referendum and a subsequent approval by a paritary commission. These actors have an extraordinary power at the level of the company because the sequence of possibilities of derogation initiated by the Auroux Laws turned the company level into the main level of bargaining.

This small explanation of the evolution of the regulations may assist us in understanding that several of those provisions were specifically thought for small and medium companies or may be of an extreme advantage to them. This is particularly important because the large majority of the population works in these companies and this is where the greatest attacks to labour law occur within countries. These possibilities of controlled decentralisation and limited flexibilisation are extremely important in a terrain characterised by low levels of institutional social dialogue and where the needs for flexibility are felt more acutely.

5.4. Corporate Governance, Firm Organisation and Collective Bargaining – new institutional complementarities?

The final chapter of this thesis will attempt to outline the new institutional complementarities that may have arisen from the modifications in corporate governance, firm organisation and collective bargaining. Before analysing each one of the new institutional complementarities that appear to be emerging, it is useful to recall briefly the modifications that have occurred.

The modifications that have occurred in corporate governance fundamentally consist in the reinforcement of the position of shareholders across each European jurisdiction. This reinforcement comes in the form of (a) increased supervision of the management board, thus reducing the agency costs vis-à-vis shareholders that an excessive managerial autonomy could cause, (b) changed ownership patterns (that consisted in the entry of institutional shareholders in Continental European stock markets and in the evolution towards a more relational shareholding in the UK initiated by the Companies Act 2006), which placed a greater degree of pressure upon the management in Continental Europe to provide results and to engage in relational management in the UK and (c) a reinforcement of the rights of

shareholders across Europe. European Law as equally had an impact in this evolution because it accompanied these trends. The reinforcement of the rights of shareholders does not amount to a general evolution towards the Anglo-American model of shareholder value as Hansmann argued.⁶⁵⁶ The unequivocal reinforcement of the position of shareholders was counterbalanced with some important counterweights that limit their preponderance. The introduction of the institution of fiduciary duties across each jurisdiction was made in accordance with the idea of enlightened shareholder value; this provides the management board with a considerable margin of manoeuvre in managing the company in the long-term interest of the shareholders and making the necessary alliances with the stakeholders in order to promote long-term sustainable shareholder value. The entry of institutional investors in Europe was not so overwhelming to the point of transforming European stock markets; although the levels of ownership concentration are considerable lower in Continental Europe, they still suffice to produce stable blockholdings; on the other hand, the concentration of ownership in the UK did not produce a Continental style relational form of governance but rather limited the influence of some aggressive institutional investors. Finally, the reinforcement of the shareholder rights was mainly coupled with the rights to be exercised at the general meeting, which presuppose a relatively large shareholding that creates incentives for relational investment; the case of the UK was once again singular because the reinforcement of the rights of shareholders was implemented in order to overcome the exit strategy that characterised British corporate governance and implement a voice strategy. The reinforcement of the possibility of enacting shareholder suits was counterbalanced with mechanisms to ensure that they were made in the interest of the company as a whole and not in the interest of the shareholders. The combined effect of these modifications consists in the creation of a hybrid type of corporate governance in which the relational systems will be maintained as such although with important modifications derived from the reinforcement of the rights of non-controlling shareholders (who will have a more active voice) and the British

⁶⁵⁶ Hansmann, H. and R. Kraakman (2000). The end of history for corporate law. Program for studies in law, economics and public policy, Yale Law School.

system seems to be evolving towards a market system tempered with more relational elements.⁶⁵⁷

The evolution in the organisation of firms cannot be forgotten. The extremely influential model of fordism, characterised by a strict division of work in large vertically integrated units, is increasingly being replaced by a model of organisation of work that came to be known as lean production that bets on the vertical desintegration of companies in networks of companies, the decentralisation of decision-making towards the lower levels of the firm, the reorganisation of the hierarchies and the functional divisions into working units and the security of employment based upon professional and geographical flexibility in the workplace (which includes wage flexibility) and the innovative concept of employability. In addition, employees are expected to adhere to the progress of the company and contribute to it in a proactive form. This modification of the organisation of work arose from the pressures in the capital and product markets to deliver better and cheaper goods. This had an impact in the organisation of companies that evolved from the large vertically integrated unit towards the mother company bound to a network of subcontractors by contractual means.⁶⁵⁸

These modifications necessarily had to have an impact in the organisation of employee representation. The beginning of this chapter attempted to illustrate the diversity of the patterns of employee representation in each jurisdiction under study and the institutional complementarities that those patterns of employee representation had in relation to the prevailing system of corporate governance in that country in accordance with a contractarian conception of the firm. The second part of this chapter attempted to demonstrate the evolutions in the forms of employee representation with the emergence of new types of actors and agreements in each one of the jurisdictions under study that appear to obey to some common principles. An element of extreme importance, because it modelled the evolution of the national models, consisted in the evolution of the system of European employee representation. The description of the European Law on the

⁶⁵⁷ Van der Berghe, L., C. Van der Elst, et al., Eds. (2002). Corporate Governance in a Globalising World: convergence or divergence? A European perspective, Kluwer.

⁶⁵⁸ Ruigrok, W. and R. v. Tulder (1995). The Logic of International Restructuring, Routledge, Ekstedt, E. (2007). A New Division of Labour: the "projectification" of working and industrial life.

participation of the workforce stressed that the evolution of the Directives tended towards the progressive involvement of the workers in the life of companies; this involvement was made by means of the enactment of information and consultation procedures in specific circumstances (the so-called reactive directives) towards a more indeterminate and permanent level of social dialogue in transnational companies (the proactive directives). The evolution from the reactive towards the proactive directives was accomplished by two means: the diversification of the powers of the actors at the level of the company and the reinforcement of the procedures for information and consultation of the workforce, which evolved from subject-specific towards a dynamic open-ended procedure. The national models of employee representation seem to have equally exhibited a similar evolution: each jurisdiction under study seems to have undertaken measures to reinforce the powers of the actors at the company-level and devised new types of agreements. These new types of agreements are of a paramount importance because they appear to be the sign of a new type of industrial relations based upon cooperation between the management and the workforce. These agreements may be flexibilisation agreements, procedural agreements or partnership agreements. The flexibilisation agreements allow the management and the employee representatives (whether union or elected) to deviate from the standards laid down in the law or collective agreements in certain circumstances and in accordance to certain limits. The objective is to deal with crisis situations and avoid redundancies or the insolvency of the company. Procedural agreements are a distinct type of agreements that attempt to bargain a restructuring before it occurs. The objective is to avoid social conflict and agree on the stages that the restructuring procedure will follow. Their main application is collective redundancies procedures although they are not limited to them. Finally, partnership agreements consist in procedures destined to engage the workforce more actively in the promotion of the success of the company and encouraging them to undertake a more participative role. They often involve stages of concession bargaining by the employee representatives in exchange for other types of benefits by the employer.

The question remains: are the evolutions in the models of employee representation (underpinned in a diverse role for the actors at the level of the company and new types of agreements) linked to the developments in

corporate governance? Can they be considered as institutionally complementary? There seems to be a link between them that the following matrix will attempt to demonstrate:

	S t r o n g e r Sharehold. Protection	Fiduciary duties	Lean management
Diverse Actors	1	2	3
New Agreements	4	5	6

(1) diverse company-level actors + stronger shareholder protection –

there seems to be a link between the development of the actors at the level of the company and the reinforcement of the position of shareholders achieved by the reforms in the structures of the management board, their statutory rights and ownership structures. The reinforcement of the protection of the shareholders (in particular non-controlling shareholders) reduced their agency cost vis-à-vis managers who saw themselves under an increased pressure to deliver results. This might have given rise to a class-conflict (characterised by the alignment of interests of managers and shareholders against employees) that the employees had to fight somehow.⁶⁵⁹ The solution seems to have laid in the development of employee representation within the company. The diversification of the powers of the actors at the level of the company had the capacity of providing the management board with sufficient margin of manoeuvre to adapt the management of the company to the pressure of the shareholders and at the same time attempt to safeguard the interests of the employees within the company.

(2) diverse actors + fiduciary duties – the reinforcement of the power of the actors at the level of the company and the widespread introduction of the philosophy of enlightened shareholder value by means of the legal transplant of fiduciary duties also seems to be connected. The purpose of the fiduciary duties and the enlightened shareholder value theory was to provide management with a margin of manoeuvre within the company in order to pursue long-term strategies free from impatient shareholders pressure. The

⁶⁵⁹ Höpner, M. (2005b). "What connects Industrial Relations and Corporate Governance? Explaining institutional complementarity." *Socio-Economic Review* 3(2).

reinforcement of the powers of the company-level actors seems to have been complementary to this development because the employee representatives could use this margin of manoeuvre in order to attempt to safeguard their interests in the pursuit of shareholder value. Since managers had to abide by the pressure of shareholders, employees had to devise a way to cope with that pressure.

(3) diverse actors + lean management – the reinforcement of the powers of the actors also seems to be connected to the philosophy of lean management. Since the philosophy of lean management is strongly dependent on the organisation of workers in working units gifted with a considerable degree of autonomy, the reinforcement of the powers of the actors at the level of the company appears to be a natural development of this technique of work organisation.

(4) new agreements and stronger shareholder protection - the new type of agreements equally seem to be connected to the stronger protection afforded to shareholders. Since managers had to abide by increasing pressures by shareholders, these new types of agreements allowed them to cope with situations of crisis and economic downturn, engage in quick and peaceful restructurings or to devise the best internal organisation that would boost the competitiveness of the company.

(5) new agreements + fiduciary duties – the link between the new types of agreements and the fiduciary duties appears evident. The margin of manoeuvre provided to the management board by the fiduciary duties may be used to bargain these new types of agreements and adapt the company to changed conditionalisms.

(6) new agreements + lean management – the link also appears to be evident. These agreements appear to be a means of restructuring and implementation of this new philosophy of work organisation, in particular the procedural and the partnership agreements.

Conclusion

The developments in the national forms of employee representation and collective bargaining seem to have been able to provide an adaptation to the challenges raised by a more shareholder-oriented form of governance and the defies of regulation, product markets and the attitude of investors identified by Deakin et alii.⁶⁶⁰ The key provisions here are the fiduciary duties of managers and the new types of agreements. The fiduciary duties of managers – in particular the implementation of the business judgement rule – have provided managers with a relevant margin of manoeuvre from the pressures of shareholders. Although they are still ultimately accountable to shareholders, their position allows them to develop a number of alliances. The diversification of the powers of the actors at the level of the company seems to be of paramount importance to deal with these challenges. The new types of agreements provide managers with sufficient margin of manoeuvre to overcome unexpected downturns in economic activity without having to engage in redundancies, achieve quicker and peaceful restructurings and align their interests with those of the employees by means of partnership agreements. This appears as a good implementation in each country – to the extent possible – of the idea of *democratie économique* put forward by Aglietta/Rebérioux as the future model of governance of companies that is capable of fostering economic and competitive growth as well as social protection.⁶⁶¹ If we place this in the language of the contractarian conception of the company, it appears as the best possible means of reducing the agency costs of managers vis-à-vis shareholders and stakeholders (employees) that the governance of the company in this new competitive world demands. One question remains however: there is an undeniable reinforcement of the powers of the shareholders in this new economy that places a considerable degree of

⁶⁶⁰ Slinger, G. and S. Deakin (1999). Company Law as an instrument of inclusion: re-regulating stakeholder relations in the context of takeovers, ESRC Centre for Business Research, University of Cambridge, Deakin, S., Richard Hobbs, et al. (2001). Partnership, ownership and control: the impact of corporate governance on employment relations, ESRC Centre for Business Research, University of Cambridge, Deakin, S., Richard Hobbs, et al. (2005). Anglo-American Corporate Governance and the employment relationship: a case to answer?, ESRC Centre for Business Research, University of Cambridge, Deakin, S., Hugh Whittaker (2007). "Re-embedding the corporation? Comparative perspectives on corporate governance, employment relations and corporate social responsibility " *Corporate Governance* 15(1).

⁶⁶¹ Aglietta, M. and A. Rebérioux (2004). *Dérives du capitalisme financier*, Bibliothèque Albin Michel.

pressure upon the managers in addition to the fierce international competition. The philosophy of enlightened shareholder value that underpins the fiduciary duties in the corporate governance reforms that are currently taking place may place a defence mechanism but never a barrier to the overwhelming pressure of shareholders. The adaptation of the structures of employee representation and collective agreements may provide an answer but never a counterweight to the pressure to deliver results. It is still considerably easier to make employees redundant in order to cut costs and maintain the results than to convince shareholders of the benefits of a longer-term investment culture and the need to invest in human capital. Despite the merits of these transformations, employees are still in a considerably weak position and these new mechanisms appear to be more of an adaptation due to the strength of the circumstances than a proper counterbalance to the pressure of the shareholders.

Thesis

Corporate Governance and Labour Law were - until recently - regarded as radically separate fields of study. With the only exception of the German "*Unternehmensrecht*", which deals with the particularities of the German system of co-determination, the majority of the company and labour lawyers never investigated the possible relationships between Corporate Governance and Labour Law. This thesis attempted to challenge this view using a contractarian conception of the company and the theory of institutional complementarities and present in a European and comparative evolutionary perspective how the national systems of Corporate Governance, Employee Representation and Collective Bargaining may be regarded as complementary and how the systems are currently in a state of change that follows two common paths: the hybridisation of the structures of Corporate Governance and the decentralisation of the structures of Employee Representation and Collective Bargaining.

The advances in the theory of the firm have increasingly challenged the division between Corporate Governance and Labour Law. The widespread conceptualisation of the firm as a nexus of contracts and the classification of employees as stakeholders of the firm led some leading scholarship to interrogate the position of employees in the governance of the firm and the impact of the distinct systems of Corporate Governance upon the employment relations.⁶⁶² This soon proved to be a daunting task: there is a diversity of systems of Corporate Governance and Labour Law across countries and the fact that these systems did not emerge merely by means of market forces but by means of a plethora of processes that combined the prevalent political economy of a country, tradition, interest groups, cultural factors, the products

⁶⁶² Blair, M. M. (1999). "Team Production Theory of Corporate Law." *Virginia Law Review* **85**: 247 ff, Blair, M. M. and M. J. Roe, Eds. (1999). *Employees and Corporate Governance*, The Brookings Institution, Höpner, M. (2003b). *Wer beherrscht die Unternehmen? Shareholder value, Managerherrschaft und Mitbestimmung in Deutschland* Campus Verlag, Gospel, H. and A. Pendleton, Eds. (2005). *Corporate Governance and Labour Management - an international comparison*, Oxford, Höpner, M. (2005). Corporate Governance in transition: ten empirical findings on shareholder value and industrial relations in Germany, Max Planck Institute für Gesellschaftsforschung, Jackson, G., M. Höpner, et al. (2005). Corporate Governance and Employees in Germany: changing linkages, complementarities and tensions. *Corporate Governance and Labour Management: an international comparison*. H. Gospel and A. Pendleton, Oxford, Höpner, M. (2005b). "What connects Industrial Relations and Corporate Governance? Explaining institutional complementarity." *Socio-Economic Review* **3**(2).

markets, among other elements, complicated all attempts to undertake an analysis.⁶⁶³

This thesis proposed to use the concept of *institutional complementarities* developed by Aoki in order to understand the possible complementarities between each national system of Corporate Governance and Employee Representation (including collective bargaining). The author proposed that each one of the elements of the national system could be considered as complementary to the remaining elements of the system in such a form as to create a joint result that is greater than the individual parts composing it. It is worthwhile remembering that each one of the elements of the system must be seen within its due context in the set of attempts to explain the development of the distinct patterns of corporate governance and employee representation: these elements are the macro-economic environment, the prevalent system of organisation of production, the political economy of the country, among others. This thesis defended that the national systems of corporate governance and employee representation developed in the context of a macro-economic environment characterised by keynesianism, fordist production structures and growth by vertical expansion. The institutional complementarities between corporate governance and employee representation assist in understanding the reasons why the national systems developed within that institutional endowment with certain specific configurations.

This analysis faced another difficulty however. The national systems of Corporate Governance, Employee Representation and Collective Bargaining under analysis are not immutable but have been in a stage of change over the last years. The institutional endowment in which companies operated modified considerably from the 1970s onwards. The successive crises that hit the

⁶⁶³ See the difficulties found by Deakin in the comparison: Slinger, G. and S. Deakin (1999). *Company Law as an instrument of inclusion: re-regulating stakeholder relations in the context of takeovers*, ESRC Centre for Business Research, University of Cambridge, Deakin, S., Richard Hobbs, et al. (2001). *Partnership, ownership and control: the impact of corporate governance on employment relations*, ESRC Centre for Business Research, University of Cambridge, Ahlring, B. and S. Deakin (2005). *Labour regulation, corporate governance and legal origin: a case of institutional complementarity* European Corporate Governance Institute, Deakin, S., Richard Hobbs, et al. (2005). *Anglo-American Corporate Governance and the employment relationship: a case to answer?*, ESRC Centre for Business Research, University of Cambridge, Deakin, S., Hugh Whittaker (2007). "Re-embedding the corporation? Comparative perspectives on corporate governance, employment relations and corporate social responsibility " *Corporate Governance* 15(1).

Western world and the exhaustion of the former models of production demanded a deep reform of the system. The macro-economic system modified from keynesianism towards monetarism; the preferred model of growth changed from expansion towards innovation; companies had to deal with a considerably new economically unstable world; the preferred model of growth modified from fordism towards lean production; the crisis of the early 2000s with the corporate scandals raised the awareness of the need for a new system of production.

This demanded some considerable transformations to the systems. This thesis then proceeded to analyse the developments in the national systems of Corporate Governance, Employee Representation and Collective Bargaining in order to attempt to understand the scope of evolution.

The national systems of Corporate Governance are currently in a state of change. The legal thinking has tended to reduce the debate on the changes to three distinct trends: some claim that the national systems of Corporate Governance are currently converging towards one single best model of Corporate Governance, which is generally coincident with the anglo-saxon model; others claim that the scope for convergence is more apparent than real and that in reality systems are diverging for a number of reasons, such as path-dependencies, the pressure of interest groups, political economies, among others; finally some claim that there appears to be in reality a phenomenon of hybridisation of the patterns of Corporate Governance by means of which each

system will borrow elements from the other system and develop its own system of Corporate Governance.⁶⁶⁴

This thesis attempted to analyse these theories against the background of the developments registered in each one of the countries under study. Using a comparative methodology, this thesis attempted to analyse the developments registered in management boards, ownership structures, shareholder rights and in the governance of SMC. We found that the national patterns of Corporate Governance appear to be in a state of hybridisation: whereas it is undeniable that relational and governmental systems are increasingly becoming more marketised and exposed to the pressure of shareholders, it is nonetheless undeniable that the market systems are also currently in a state of change that is introducing relational systems in them. We conclude that the final result appears to be one of hybridisation: the main features of the national systems of Corporate Governance will be maintained but not in its purest form

⁶⁶⁴ Berghe, L. v. d. (2002). Corporate Governance in a Globalising World: Convergence or Divergence? A European perspective, Kluwer, Hansmann, H. and R. Kraakman (2002). Towards a single model of corporate law. Corporate Governance regimes: convergence and diversity. J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneboog, Oxford, Hopt, K. J. (2002). Common principles of Corporate Governance in Europe. Corporate Governance Regimes - convergence and diversity. J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneboog, Oxford, Van der Berghe, L., C. Van der Elst, et al., Eds. (2002). Corporate Governance in a Globalising World: convergence or divergence? A European perspective, Kluwer, Wymeersch, E. (2002). Convergence or divergence in Corporate Governance patterns in Western Europe. Corporate Governance Regimes - convergence and diversity. J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneboog, Oxford, Bebchuk, L. A. and M. J. Roe (2004). A theory of path-dependence in corporate ownership and governance. Convergence and persistence in Corporate Governance. J. N. Gordon and M. J. Roe, Cambridge University Press, Gordon, J. N. and M. J. Roe, Eds. (2004). Convergence and Persistence in Corporate Governance, Cambridge, Braendle, U. C. and J. Noll (2005). "On the convergence of national corporate governance systems." Journal of Interdisciplinary Economics **16**, Siems, M. M. (2008). Convergence in shareholder law, Cambridge. See the following examples: Berghe, L. v. d. (2002). Corporate Governance in a Globalising World: Convergence or Divergence? A European perspective, Kluwer, Hansmann, H. and R. Kraakman (2002). Towards a single model of corporate law. Corporate Governance regimes: convergence and diversity. J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneboog, Oxford, Hopt, K. J. (2002). Common principles of Corporate Governance in Europe. Corporate Governance Regimes - convergence and diversity. J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneboog, Oxford, Van der Berghe, L., C. Van der Elst, et al., Eds. (2002). Corporate Governance in a Globalising World: convergence or divergence? A European perspective, Kluwer, Wymeersch, E. (2002). Convergence or divergence in Corporate Governance patterns in Western Europe. Corporate Governance Regimes - convergence and diversity. J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneboog, Oxford, Bebchuk, L. A. and M. J. Roe (2004). A theory of path-dependence in corporate ownership and governance. Convergence and persistence in Corporate Governance. J. N. Gordon and M. J. Roe, Cambridge University Press, Gordon, J. N. and M. J. Roe, Eds. (2004). Convergence and Persistence in Corporate Governance, Cambridge, Braendle, U. C. and J. Noll (2005). "On the convergence of national corporate governance systems." Journal of Interdisciplinary Economics **16**, Siems, M. M. (2008). Convergence in shareholder law, Cambridge.

because they will borrow elements from the other system. EU Law has equally contributed to this trend.

The transformations in the national systems of Corporate Governance raises the question of their impact in national systems of Employee Representation and Collective Bargaining. If systems are to be seen as complementary, then the transformations in some elements of the system will necessarily have an impact in the other elements. We also collected data from the evolution in the national systems that appears to reveal that national systems are also undergoing a process of hybridisation of their national structures.

The analysis of the developments of the national systems of employee representation should initiate with the transformations in the organisations of companies. The means by which a company is organised is the form of allocation of the inputs in the form of capital and labour in the nexus of contracts that composes the firm. The industrial relations literature has outlined that systems of organisation of production have gone through three distinct stages over the last 50 years: craft production, fordism and lean production. The most relevant ones for this thesis are fordism and lean production. Fordism is a means of organisation of production that is designed for the production of mass commodities. The prevalent systems of Corporate Governance, Employee Representation and Collective Bargaining emerged in Europe during the times of the Imperium of fordism. Since Europe needed an industrialised economy capable of producing cheap and mass goods, then the existing systems of Corporate Governance and Employee Representation had to adapt in accordance with the needs of this system of production. That is the reason why we witnessed the emergence of concentrated shareholdings and mass labour unions in Continental Europe and unaccountable managers and decentralised company-level unions in the UK. The modifications that occurred in the economic circumstances from the 1970s onwards implied a great degree of changes to the structures of Corporate Governance and the organisation of firms. The economic fluctuations, the pressure of the shareholders and the general view that the company should be restructured for “*shareholder value*” - the new standard for business performance - implied a new organisation of firms in what became known as lean management. In short, this managerial philosophy encouraged the concentration of companies to its core-business -

outsourcing all ancillary activities - the division of companies in strategic business units, the projectification of labour and the promotion of participative management schemes. The idea was to promote the engagement of employees in their companies in order to allow them to become more adaptable to the economic fluctuations and to the pressure of shareholders.

The analysis of the modifications occurred in the national systems should initiate with a review of the modifications introduced by EU Law. EU Law has accepted change and restructuring as a necessary element in the life of companies and has attempted to devise mechanisms to engage employees into the life of companies. The regulatory activity of the EU in this aspect may be divided into three large groups: (a) the reactive directives and (b) the proactive directives. The reactive directives are designed to provide employees with instruments to defend their interests in situations of crisis. The proactive directives are essentially used in multi-national companies and attempt set up employee representative bodies in a supra-national context in order to reduce the information gap of management *vis-à-vis* employees and engage employees into the life of companies. The joint result of these legal instruments consists in the development of company-level social dialogue.

National systems of employee representation had to adapt to the new forms of corporate governance and organisation of work. This thesis defended that this adaptation consisted fundamentally in the decentralisation of collective bargaining towards the level of the company achieved by means of the diversification of the powers of the actors at the level of the company and in the emergence of new types of collective agreements.

The description of the evolution of the actors at the level of the company in each system attempted to demonstrate the extent to which each system is evolving towards a controlled decentralisation of its structures of collective bargaining; the actors at the level of the company are clearly having a more relevant role while the trade unions are controlling the actions of these actors in order to ensure that they correspond to the genuine interest of the employees and of the needs of the company and not to the interest of the employer to undermine social dialogue and union power.

The description of the role of the actors must be completed with the description of the evolution of collective agreements. The new types of agreements that each system appears to have been developing may be

subsumed to three types: (a) flexibilisation agreements, (b) procedural agreements and (c) anticipatory agreements. These diverse types of agreements may be considered as a development and adaptation of the traditional structures of collective bargaining to the new macro-economic environment and corporate governance structures. They appear to recognise employees as stakeholders of the company and attempt to engage them in the success of the company by means of the flexibilisation of their wages and working time in order to allow the company to adapt to economic fluctuations and the demands of stakeholders, improve the communication channels in order to allow the company to engage in a successful restructuring with a minimum of social consequences and engage employees in the success of the company by means of the improvement of the communication channels between management and employees, a human resource management underpinned in lean management and decentralisation and concession bargaining in order to make the company more competitive

This description of the evolution of Corporate Governance and Employee Representation (including Collective Bargaining) may allow us to propose a new type of institutional complementarity between the new elements of the system: a more marketised system (relational in the case of the UK) will have as a complementary part the development of a decentralised culture of collective bargaining that will attempt to engage employees into the life of companies by means of new types of actors and agreements in order to recognise them as true stakeholders of the company. Relational systems of Corporate Governance (Germany, France and Portugal in this case) were underpinned in a strong industry level social dialogue in order to reduce the scope for competition in wages and conditions of work: the only exception was Germany, which had co-determination in addition to industry level social dialogue; company-level social dialogue in France and Portugal could be better described as communication but not participation. The new pressures placed upon the management boards on account of the unstable economic conditions, the pressure of the shareholders and the new types of organisation of work demanded an adaptation of the structures of Employee Representation and Collective Bargaining. The same thing occurred in the UK, a country that has been attempting to introduce relational elements into its system in order to promote a longer term investment culture. The answer lay in a more

decentralised culture of Employee Representation and Collective Bargaining because the pressures were displaced towards the level of the company. Management boards needed mechanisms to engage into dialogue with the employees: the answer lay in the diversification of the powers of the actors at the level of the company and in the development of new types of collective agreements thought to address the difficulties faced by firms while attempting to safeguard the interests of labour.

The only question that remains concerns the efficacy of these developments as a counterbalancing mechanism to the pressure of shareholders in companies. It appears that they are merely an adaptation to the increased powers of shareholders within companies and that they are unable to function as a counterbalancing mechanism against shareholder pressure. The efficacy of these new types of agreements and the development of a sound culture of social dialogue at the level of the company depends upon the existence of strong actors that are able to function as a counterbalancing mechanism to the interests of shareholders. The current state of affairs indicates that that is unlikely to occur without the good will of management

Bibliography

-). "Les accords de méthode." Droit Social(9/10): 915-923.
, Center for European Studies: Program for the Study of Germany and Europe Working Paper Series.
, Center for European Studies: Program for the Study of Germany and Europe Working Paper Series.
, IDHE CNRS.
." Economy and Society **29**(1): 36-53.
." International Journal of Auditing **6**(155-182).
." International Journal of Auditing **6**(155-182).
Adams, M. (1999). "Cross holdings in Germany." Journal of Institutional and Theoretical Economics **155**(1): 80-109.
Adams, M. (1999). "Cross holdings in Germany." Journal of Institutional and Theoretical Economics **155**(1): 80-109.
Addison, J. T. and W. S. Siebert (2002). Changes in collective bargaining in the UK. Bonn, Forschungsinstitut zur Zukunft der Arbeit.
Administrateurs, I.-I. F. d. (2007). La gouvernance des sociétés cotées. Synthèse des recommandations sur le rôle et les modes d'action des conseils.
Aglietta, M. and A. Rebérioux (2004). Dérives du capitalisme financier, Bibliothèque Albin Michel.
Aguiló Piña, J. F. (2002). "La sociedad anónima europea: constitución, órganos y otros aspectos." Revista de Derecho Mercantil(246): 1795-1892.
Ahlering, B. and S. Deakin (2005). Labour regulation, corporate governance and legal origin: a case of institutional complementarity European Corporate Governance Institute.
Ahlering, B. and S. Deakin (2005). Labour regulation, corporate governance and legal origin: a case of institutional complementarity European Corporate Governance Institute.
Ahlering, B. and S. Deakin (2005). Labour regulation, corporate governance and legal origin: a case of institutional complementarity European Corporate Governance Institute.
Allertz, W. (2007). Cross-border organisation development and its consequences for industrial relations. Agire research papers.
Antonmattei, P.-H. (2003). "Licencements économiques et négociation collective: un nouvel accord collectif de travail est né."
Antonmattei, P.-H. (2005). "Accord de méthode, génération 2005: la "positive attitude"." Droit Social(4): 399-402.
Antonmattei, P.-H. (2007). "La gestion prévisionnelle des emplois et des compétences: un défi social, économique et juridique." Droit Social: 1-3.
Antonmattei, P.-H. (2009). "Quelques propos sur la promotion de l'accord d'entreprise." Droit Social(9/10): 883-885.
Aoki, M. (2001). Towards a comparative institutional analysis, Stanford University Press.
Aoki, M. (2001). Towards a comparative institutional analysis, Stanford University Press.
Aoki, M. (2001). Towards a comparative institutional analysis, Stanford University Press.

- Armbrüster, C. (2006). Recent Developments in German Corporate Law. Centro di Ricerca per il Diritto de l'impresa, Libera Università Internazionali degli Studi Sociali.
- Armbrüster, C. (2006). Recent Developments in German Corporate Law. Centro di Ricerca per il Diritto de l'impresa, Libera Università Internazionali degli Studi Sociali.
- Armour, J. (2005). Who should make corporate law? EC legislation vs regulatory competition, European Corporate Governance Institute.
- Armour, J. (2006). Legal capital: an outdated concept. Cambridge, Centre for Business Research.
- Armour, J. and M. J. Whincop (2004). An economic analysis of shared property in partnership and close corporation law. The governance of close corporations and partnerships. US and European perspectives. J. A. McCahery, T. Raaijmakers and E. P. M. Vermeulen, Oxford.
- Armour, J. and M. J. Whincop (2004). An economic analysis of shared property in partnership and close corporation law. The governance of close corporations and partnerships. US and European perspectives. J. A. McCahery, T. Raaijmakers and E. P. M. Vermeulen, Oxford.
- Armour, J., S. Deakin, et al. (2003). "Shareholder primacy and the trajectory of UK Corporate Governance." British Journal of Industrial Relations **41**(3): 531-555.
- Armour, J., S. Deakin, et al. (2007). Shareholder protection and stock market development: an empirical test of the legal origins hypothesis, Centre for Business Research - University of Cambridge.
- Armstrong, P., A. Glyn, et al. (1991). Capitalism since 1945, Blackwell.
- Armstrong, P., A. Glyn, et al. (1991). Capitalism since 1945, Blackwell.
- Artus, I. (2001). Krise des deutschen tarifsystems - die erosion des flächentarifvertrags in Ost und West, Westdeutscher Verlag.
- Artus, I. (2003). "Die Kooperation zwischen Betriebsräten und Gewerkschaften als neuralgischer Punkt des Tarfsystems. Eine exemplarische Analyse am Beispiel Deutschlands." Industrielle Beziehungen **10**(2): 250-271.
- Arvidsson, N. (2006). Global strategies of multinational corporations. Agire research papers.
- Ashford, R. (2002). "The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility." Tulane Law Review **76**: 1187-1205.
- Assman, H.-D. and R. A. Schütze (2007). Handbuch des Kapitalanlagerechts, C.H. Beck.
- Auroux, J. (1983). "Un nouveau droit du travail?" Droit Social(1): 2-4.
- Bachmann, G. (1999). "Die Geschäftsordnung der Hauptversammlung." Die Aktiengesellschaft **44**(5): 210-215.
- Backhaus, J. G. (1999). Company Board Representation. The Elgar Companion to Law and Economics. J. G. Backhaus, Cheltenham.
- Backhaus, J. G. (1999). Company Board Representation. The Elgar Companion to Law and Economics. J. G. Backhaus, Cheltenham.
- Backhaus, J. G. (1999). Company Board Representation. The Elgar Companion to Law and Economics. J. G. Backhaus, Cheltenham.

- Bainbridge, S. M. (1996). "Participatory Management within a Theory of the Firm." The Journal of Corporation Law **21**(4): 658-730.
- Barbiera, L. (2000). Il Corporate Governance in Europa - amministrazione e controlli nelle società per azioni in Italia, Francia, Germania e Regno Unito. Milano, Giuffrè.
- Barbiera, L. (2000). Il Corporate Governance in Europa - amministrazione e controlli nelle società per azioni in Italia, Francia, Germania e Regno Unito. Milano, Giuffrè.
- Barnard, C. (2007). Worker Representation in the UK. Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives R. Blainpain, Kluwer: 83-103.
- Barnard, C. and S. Deakin (2002). "Reinventing the European corporation? Corporate Governance, social policy and the single market " Industrial Relations Journal **33**(5): 484-499.
- Barry, P. (2005). Company Law Reform White Paper, Department for Trade and Industry.
- Barry, P. (2005). Company Law Reform White Paper, Department for Trade and Industry.
- Barthélemy, J. (2009). "Vers de nouvelles évolutions du droit de la négociation collective? ." Droit Social(8/10): 907-910.
- Basset, P. (1987). Strike free: new industrial relations in Britain, Papermac.
- Baumann, T. (1992). Die delegation tariflicher rechtsetzungsbefugnisse, Dunker & Humblot.
- Baums, T. (1999). "Il sistema di "corporate governance" in Germania ed i suoi recenti sviluppi " Rivista delle società: 1-19.
- Baums, T. (1999). "Il sistema di "corporate governance" in Germania ed i suoi recenti sviluppi " Rivista delle società: 1-19.
- Baums, T. (1999). "Il sistema di "corporate governance" in Germania ed i suoi recenti sviluppi " Rivista delle società: 1-19.
- Baums, T. (2007). "Aktuelle entwicklungen im Europäischen Gesellschaftsrecht." Der Aktiengesellschaft **52**(3): 57-65.
- Baums, T. (2007). "Aktuelle entwicklungen im Europäischen Gesellschaftsrecht." Der Aktiengesellschaft **52**(3): 57-65.
- Baums, T. and K. Scott (2003). Taking shareholder protection seriously? Corporate Governance in the United States and Germany, Stanford Law School.
- Bayer, W. (2002). Aktionärsrechte und Anlegerschutz - kritische Betrachtung der lex lata und Überlegungen de elge ferenda von der Hintergrund des Berichts der Regierungskommission Corporate Governance und des Entwurfs eines 4. Finanzmarktförderungsgesetzes Corporate Governance. P. Hommelhoff, M. Lutter, K. Schmidt, W. Schön and P. Ulmer, Recht und Wirtschaft Verlag.
- Bebchuck, L. (2005). "The case for increasing shareholder power." Harvard Law Review **118**(3): 833-913.
- Bebchuk, L. A. and M. J. Roe (2004). A theory of path-dependence in corporate ownership and governance. Convergence and persistence in Corporate Governance. J. N. Gordon and M. J. Roe, Cambridge University Press.
- Berend, I. T. (2006). An economic history of 20th century Europe, Cambridge University Press.

- Berghe, L. v. d. (2002). Corporate Governance in a Globalising World: Convergence or Divergence? A European perspective, Kluwer.
- Berle, A. and G. Means (1932). The modern corporation and private property. New York, Harcourt Brace.
- Berle, A. and G. Means (1932). The modern corporation and private property. New York, Harcourt Brace.
- Bernhardt, W. (2000). "Acquisitions, mergers and cancelations in Germany - in the white water of shareholder value." Corporate Governance **8**(4): 327-334.
- Berrar, C. (2001). Die entwicklung der Corporate Governance in Deutschland im internationalen vergleich. Baden-Baden, Nomos Verlagsgesellschaft.
- Berthold, N. and O. Stettes (2001). Der Flächentarifvertrag - von wegbereiter der Wirtschaftswunders zum Verursacher der Beschäftigungsmisere. Ökonomische Analyse des Arbeitsrechts. C. Ott and D. Schäfer, Mohr Sibeck.
- Berthold, N., B. M., et al. (2003). "Betriebliche bündnisse für arbeit. Eine empirische untersuchung fur den deutschen maschinen- und anlagenbau." Wissenschaftliche Beiträge des Lehrstulls für Volkswirtschaftslehre, Wirtschaftsordnung und Sozialpolitik **68**.
- Bessy, C. and E. Brousseau (1998). "Technology licensing contracts. Features and diversity." International Review of Law and Economics **18**(4): 451-489.
- Beyer, J. (2003). Corporate Governance in Deutschland, Max Planck Institute für Gesellschaftsforschung.
- Beyer, J. and M. Höpner "The disintegration of organised capitalism: German corporate governance in the 1990s." West European Politics **26**(4): 179-198.
- Beyer, J. and M. Höpner "The disintegration of organised capitalism: German corporate governance in the 1990s." West European Politics **26**(4): 179-198.
- Beyer, J. and M. Höpner Alle macht den Aktionären? Unternehmenskontrolle in Deutschland, Max Planck Institute für Gesellschaftsforschung.
- Biagi, M. (2003). Forms of employee representational participation. Marco Biagi, selected writings. K. Law: 191-233.
- Bispink, R. and T. Schulten (2003). "Decentralisation of German collective bargaining - current trends and assessments from a works and staffs council perspective." WSI Mitteilungen(special issue): 24-41.
- Blainpain, R. (2004). Comparativism in Labour Law and Industrial Relations. Comparative Labour Law and Industrial Relations in Industrialised Market Economies. R. Blainpain, Kluwer.
- Blair, M. M. (1999). "Team Production Theory of Corporate Law." Virginia Law Review **85**: 247 ff.
- Blair, M. M. (1999). "Team Production Theory of Corporate Law." Virginia Law Review **85**: 247 ff.
- Blair, M. M. and M. J. Roe, Eds. (1999). Employes and Corporate Governance, The Brookings Institution.
- Blair, M. M. and M. J. Roe, Eds. (1999). Employes and Corporate Governance, The Brookings Institution.

- Blanke, T. (2002). Workers' right to information and consultation within the undertaking (art.27). European Labour Law and the EU Charter of Fundamental Rights. B. Bercusson, ETUI.
- Blanke, T. (2003). "Arbeitsgruppen und Gruppenarbeit in der Betriebsverfassung - direkt demokratische Mitbestimmung als "zweiseitig paktierte Delegation"." Recht der Arbeit(3): 140-155.
- Blanpain, R. (2008). European Labour Law, Kluwer.
- Blanquet, F. (2001). "Enfin la société européenne la "SE"." Revue du Droit de L'Union Européenne(1): 115-128.
- Bloch, L. and E. Kremp (1999). Ownership and voting power in France. The Control of Corporate Europe. F. Barca and M. Becht, Oxford.
- Bloch, L. and E. Kremp (1999). Ownership and voting power in France. The Control of Corporate Europe. F. Barca and M. Becht, Oxford.
- Boni, G. (2008). "Regards extérieurs et comperés sur les accords collectifs conclus lors des restructurations." Semaine Sociale Lamy(1376): 47-58.
- Borenfreund, G. (2004). "La négociation collective dans les entreprises dépourvues de délégués syndicaux." Droit Social(6): 606-620.
- Borenfreund, G. (2009). "La renouveau du droit syndical dans l'entreprise: entre faveur et défiance?" Droit Social(6): 700-710.
- Bouère, J.-P. (2001). "P-DG ou président et directeur général?" Bull.jolly: 695 ff.
- Bourne, N. (2008). Bourne on Company Law, Routledge-Cavendish.
- Bourne, N. (2008). Bourne on Company Law, Routledge-Cavendish.
- Braendle, U. C. (2006). Shareholder protection in the USA and Germany: on the fallacy of LLSV. German Working Papers on Law and Economics, University of Machester.
- Braendle, U. C. and J. Noll (2004). The Societas Europaea – A Step Towards Convergence of Corporate Governance Systems?, SSRN.
- Braendle, U. C. and J. Noll (2005). "On the convergence of national corporate governance systems." Journal of Interdisciplinay Economics **16**.
- Bratton, W. W. and J. A. McCahery (2002). Comparative Corporate Governance and Barriers to Global Cross Reference. Corporate Governance Regimes - convergence and diversity J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneboog, Oxford.
- Bratton, W. W. and J. A. McCahery (2002). Comparative Corporate Governance and Barriers to Global Cross Reference. Corporate Governance Regimes - convergence and diversity J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneboog, Oxford.
- Brewster, C. (1992). Collective agreements: old and new styles. A Handbook on Industrial Relations Practice: Practice and Law in the Employment Relationship B. Towers, Kogan Page: 152-166.
- Brill-Venkatasamy, T. (2006). "The information and consultation Directive of 11 March 2002 and its transposition into French law." International Journal of Comparative Labour Law and Industrial Relations **22**(2): 259-277.

- Brors, T. (2004). Das system der Arbeitnehmer-Beteiligungs-Richtlinien - grundlage für eine Europäische Betriebsverfassung? Baden-Baden, Köln.
- Buchner, H. (2003). "Kommentar BAG 10.12.2002." Recht der Arbeit: 367 ff.
- Buck, T., A. Bruce, et al. (2003). "Long-term incentive plans, executive pay and UK company performance." Journal of Management Studies **40**(7): 1703-1721.
- Buck, T., A. Bruce, et al. (2003). "Long-term incentive plans, executive pay and UK company performance." Journal of Management Studies **40**(7): 1703-1721.
- Busch, M. (2003). Arbeitsgruppen und gruppenarbeit im Betriebsverfassungsgesetz, Tenea
- Cafaggi, F. (2004). Il governo della rete: modelli organizzativi del coordinamento inter-imprenditoriale. Reti di imprese tra regolazione e norme sociali. Nuove sfide per diritto ed economia. F. Cafaggi. Bologna, Il Mulino.
- Cafaggi, F. and P. Iamiceli (2007). Le reti di piccole e medie imprese tra proprietà familiare e nuovi scenari finanziari. Reti di impresa tra crescita e innovazione organizzativa. F. Cafaggi and P. Iamiceli, Il Mulino.
- Calabresi, G. (1961). "Some thoughts on risk distribution and the law of torts." Yale Law Journal **70**: 35-46.
- Callaghan, H. and M. Höpner "European Integration and the Clash of Capitalisms: political cleavages over takeover liberalisation." West European Politics **26**(4): 179-198.
- Callaghan, H. and M. Höpner "European Integration and the Clash of Capitalisms: political cleavages over takeover liberalisation." West European Politics **26**(4): 179-198.
- Calvão da Silva, J. (2007). "Responsabilidade civil dos administradores não-executivos, da comissão~de auditoria e do conselho geral e de supervisão." Revista da Ordem dos Advogados **67**(1).
- Calvão da Silva, J. (2007). "Responsabilidade civil dos administradores não-executivos, da comissão~de auditoria e do conselho geral e de supervisão." Revista da Ordem dos Advogados **67**(1).
- Câmara, P. (2008). O governo das sociedades e a reforma do Código das Sociedades Comerciais Código das Sociedades Comerciais e Governo das Sociedades. P. Câmara, R. d. Oliveira Neves, A. Figueiredo, A. Fernandes de Oliveira and J. Ferreira Gomes, Almedina.
- Câmara, P. (2008). O governo das sociedades e a reforma do Código das Sociedades Comerciais Código das Sociedades Comerciais e Governo das Sociedades. P. Câmara, R. d. Oliveira Neves, A. Figueiredo, A. Fernandes de Oliveira and J. Ferreira Gomes, Almedina.
- Cameira, M. A. (2006). "Portuguese companies and the new e-commerce environment." International Company and Commercial Law Review **17**(3): 108-113.
- Carneiro da Frada, M. (2007). "A Business Judgement Rule no quadro dos deveres gerais dos administradores." Revista da Ordem dos Advogados **67**(1).

- Carneiro da Frada, M. (2007). "A Business Judgement Rule no quadro dos deveres gerais dos administradores." Revista da Ordem dos Advogados **67**(1).
- Casey, N. (2000). The European Social Charter and the Revised European Social Charter. Fundamental Social Rights. Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights. C. Costello, European Commission.
- Casper, M. (2007). Informationsrechte der Aktionäre. Aktienrecht im Wandel - Grundsatzfragen des Aktienrechts. W. Bayer and M. Habersack, Mohr Siebeck. **II**: 546-578.
- Cesaro, J.-F. (2009). "La négociation dans les entreprises porvoues de délégués syndicaux." Droit Social(6): 658-668.
- Chalmers, D., C. Hadjiemmanuil, et al. (2006). European Union Law, Cambridge University Press.
- Charlton, L. W. o. (2002). "Employees, partnership and company law." Industrial Law Journal **31**(2): 99-111.
- Cheffins, B. R. (1997). Company Law. Theory, structure and operation Clarendon Press.
- Cheffins, B. R. (2006). Dividends as a substitute for corporate law: the separation of ownership and control in the United Kingdom, European Corporate Governance Institute.
- Cioffi, J. W. and M. Höpner (2005). "Left-Wing support for shareholder capitalism." Mitbestimmung(8): 57-61.
- Clark, I., P. Almond, et al. (2005). "The Americanisation of the European Business System?" Industrial Relations Journal **36**(6): 494-517.
- CMVM (2002). A indústria dos fundos de investimento em Portugal, CMVM.
- CMVM (2006). O Governo das Sociedades Cotadas em Portugal: situação em Dezembro de 2005, CMVM.
- CMVM (2006). O Governo das Sociedades Cotadas em Portugal: situação em Dezembro de 2005, CMVM.
- Coase, R. (1937). "The Nature of the Firm." Economica **4**(16): 384-405.
- Coase, R. (1937). "The Nature of the Firm." Economica **4**(16): 384-405.
- Coase, R. (1937). "The nature of the firm." Economica **4**(16): 386-405.
- Coase, R. (1960). "The problem of social cost." Journal of Law and Economics **3**(1): 1-44.
- Coase, R. (1960). "The problem of social cost." Journal of Law and Economics **3**(1): 1-44.
- Coates IV, J. (2003). Ownership. takeovers and EU Law: how contestable should EU Corporations be?, Harvard Law School.
- Coates, D. (1980). Labour in Power. London, Longman.
- Cohen, M. (1994). "L'application des nouvelles dispositions relatives à la représentation du personnel." Droit Social(2): 147-153.
- Cohen, M. (1996). "La réduction "négociée" des avantages des salariés." Droit Social(1): 18-20.
- Coin, G. (1996). "L'accord interprofessionnel du 31 octobre 1995 sur la politique contractuelle." Droit Social(1): 3-11.
- Colaiani, L. (1996). Title European works councils : a legal and practical guide : information and consultation of employees in multinational companies : what management needs to know before starting negotiations with the workforce, Sweet & Maxwell.

- Collins, H. (2001). "Regulating the employment relation for competitiveness." Industrial Law Journal **30**: 17-46.
- Collins, H. (2003). Employment Law, Oxford University Press.
- Collins, H., K. D. Ewing, et al. (2005). Labour Law: texts and materials, Oxford.
- Colombero, M. (1996). "Le regole di corporate governance nel Regno Unito: il *Cadbury Committee* e il *Greenbury Committee*." Rivista delle società: 440-464.
- Combrexelle, J.-D. (2008). "Loi du 4 mai 2004: quel bilan? Quelles perspectives?" Droit Social(1): 20-23.
- Commission, E. (2007). Report on the proportionality principle in the European Union, European Commission.
- Commission, E. (2007). Report on the proportionality principle in the European Union, European Commission.
- Costa, C. T. d. and A. d. M. Bilreiro (2003). The European Company Statute, Kluwer.
- Cozian, M., A. Viandier, et al. (2002). Droit des Sociétés. Paris, Litec.
- Cozian, M., A. Viandier, et al. (2002). Droit des Sociétés. Paris, Litec.
- Crafts, N. (2006). The world economy in the 1990s: a long-run perspective The Global Economy in the 1990s: a long-run perspective. P. W. Rhode and G. Toniolo, Cambridge.
- Craig, P. and G. De Búrca (2002). EU Law. Texts, Cases and Materials Oxford.
- Craig, P. and G. De Búrca (2002). EU Law. Texts, Cases and Materials Oxford.
- Criqui, J. L. and Peter Holt (2002). "Collective redundancies in Europe." Business Law Review: 2-4.
- Crouch, C. (2005). The place of networks in governance theory. Corporate Governance, Networks ed Innovazione. F. Cafaggi.
- Cunha, P. O. (2007). Direito das Sociedades Comerciais. Lisboa, Almedina.
- Cunha, P. O. (2007). Direito das Sociedades Comerciais. Lisboa, Almedina.
- Daelen, M. M. A. v. (2008). Risk management solutions in business law: Prospectus Disclosure Requirements, Tilburg University.
- Daicle-Duclos, B. (1998). "Le devoir de loyauté du dirigeant " Semaine Juridique - edition entreprise: 1486.
- Däubler, W. (2001). "Die novellierte Betriebsverfassung." Industrielle Beziehungen **8**(4): 364-378.
- Däubler, W. (2002). Betriebsverfassungsgesetz: kommentar für die praxis, Bund Verlag.
- Däubler, W. (2006). Das Arbeitsrecht - die gemeinsame Wahrung von Interessen um Betrieb, Rowohlt Taschenbuch Verlag
- Däubler, W. (2006). Das Arbeitsrecht - die gemeinsame Wahrung von Interessen um Betrieb, Rowohlt Taschenbuch Verlag
- Däubler, W., M. Kittner, et al., Eds. BetrVG mit Wahlordnung und EBR-Gesetz, Bund-Verlag.
- Davies, P. (2002). Introduction to Company Law, Clarendon Law series.
- Davies, P. (2002). Introduction to Company Law, Clarendon Law series.
- Davies, P. and G. P. Stapledon (1993). Corporate Governance in the United Kingdom. Aspects of Corporate Governance. M. Isaksson and R. Skog, Juristförlaget.

- Davies, P. and G. P. Stapledon (1993). Corporate Governance in the United Kingdom. Aspects of Corporate Governance. M. Isaksson and R. Skog, Juristförlaget.
- Davies, P. and M. Freedland (2004). National Report United Kingdom. The evolving structure of collective bargaining in Europe 2004. S. Sciarra, European Commission, University of Florence.
- Davies, P. L. (1994). "A challenge to the single channel." Industrial Law Journal **23**: 272 ff.
- Davies, P. L. (2003). Employee involvement in the European Company. La Société Européenne – organization juridique et fiscale, intérêts, perspectives, Dalloz: 67-79.
- Davies, P. L. and C. Kilpatrick (2004). "UK Worker Representation after the Single Channel." Industrial Law Journal **33**(2): 121-151.
- Davies, P. L. and C. Kilpatrick (2005). La représentation des travailleurs au Royaume-Uni après le canal unique. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de L'Université de Saint-Étienne.
- Davies, P. L. and M. Freedland (2007). Towards a Flexible Labour Market: labour legislation and regulation since the 1990s, Oxford.
- De Poorter, I. (2008). "Auditor's liability towards third parties within the EU: A comparative study between the United Kingdom, the Netherlands, Germany and Belgium." Journal of International Commercial Law and Technology **3**(1): 68-75.
- De Poorter, I. (2008). "Auditor's liability towards third parties within the EU: A comparative study between the United Kingdom, the Netherlands, Germany and Belgium." Journal of International Commercial Law and Technology **3**(1): 68-75.
- Deakin, S. (1999). Two types of regulatory competition: competitive federalism vs reflexive harmonisation: a law and economics perspective on Centros. Cambridge Yearbook of Legal Studies, Hart Publishing: 231-260.
- Deakin, S. (1999). Two types of regulatory competition: competitive federalism vs reflexive harmonisation: a law and economics perspective on Centros. Cambridge Yearbook of Legal Studies, Hart Publishing: 231-260.
- Deakin, S. (2007). Reflexive Governance and European Company Law. U. o. C. Centre for Business Research.
- Deakin, S. (2007). Reflexive Governance and European Company Law. U. o. C. Centre for Business Research.
- Deakin, S. and A. Hughes (1999). Economic efficiency and the proceduralisation of company law, ESRC Centre for Business Research, University of Cambridge
- Deakin, S. and S. Konzelmann (2006). Corporate Governance after Enron: an age of enlightenment? . After Enron. Improving Corporate Law and Modernising Securities Regulation in Europe and in the US. J. Armour and J. A. McCahery, Hart Publishing.
- Deakin, S., Hugh Whittaker (2007). "Re-embedding the corporation? Comparative perspectives on corporate governance, employment relations and corporate social responsibility " Corporate Governance **15**(1).
- Deakin, S., Hugh Whittaker (2007). "Re-embedding the corporation? Comparative perspectives on corporate governance, employment

- relations and corporate social responsibility " Corporate Governance **15**(1).
- Deakin, S., Richard Hobbs, et al. (2001). Partnership, ownership and control: the impact of corporate governance on employment relations, ESCR Centre for Business Research, University of Cambridge.
- Deakin, S., Richard Hobbs, et al. (2001). Partnership, ownership and control: the impact of corporate governance on employment relations, ESCR Centre for Business Research, University of Cambridge.
- Deakin, S., Richard Hobbs, et al. (2005). Anglo-American Corporate Governance and the employment relationship: a case to answer?, ESRC Centre for Business Research, University of Cambridge.
- Deakin, S., Richard Hobbs, et al. (2005). Anglo-American Corporate Governance and the employment relationship: a case to answer?, ESRC Centre for Business Research, University of Cambridge.
- Deakin, S., William S. Morris (2005). Labour Law. Oxford, Hart Publisher.
- Deakin, S., William S. Morris (2005). Labour Law. Oxford, Hart Publisher.
- Delga, J. (2002). "L'administrateur indépendant n'existe pas: dangers ; une reference inapproprié au système anglo-saxon " Reccueil Dalloz: 2858.
- Delga, J. (2004). "L'administrateur indépendant en France: un mythe?" Semaine Juridique(5).
- Didry, C. and A. Jobert (2008). Les accords de méthode en matière de restructurations : un nouveau champ du dialogue social
- Didry, C. and A. Mias (2004). Au-delà des politiques de l'emploi: le temps de travail à la recherche d'une représentation européenne des travailleurs. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint Etienne.
- Dignam, A. and M. Galanis (2008). "Corporate Governance and the importance of Macroeconomic context." Oxford Journal of Legal Studies **28**(2): 201-245.
- Dignam, A. and M. Galanis (2008). "Corporate Governance and the importance of Macroeconomic context." Oxford Journal of Legal Studies **28**(2): 201-245.
- Dignam, A. and M. Galanis (2008). "Corporate Governance and the importance of Macroeconomic context." Oxford Journal of Legal Studies **28**(2): 201-245.
- DiMaggio, P., Ed. (2001). The Twenty-First Century Firm Oxford, Princeton University Press.
- Dockés, E. (2008). Doit du Travail Dalloz.
- Dom, J.-P. (2001). "La protection des minoritaires." Revue des Sociétés **119**: 533-560.
- Dom, J.-P. (2001). "La protection des minoritaires." Revue des Sociétés **119**: 533-560.
- Dorssemont, F. (2006). "Case C-55/02, Commission of the European Communities v. Portuguese Republic, judgment of the Second Chamber of the Court of Justice of 12 October 2004 ; Case C - 188/03, Imtraud Junk v. Wolfgang Kühnel, judgment of the

- Second Chamber of the Court of Justice of 27 January 2005." Common Market Law Review **43**: 225-241.
- Drummond, F. (2005). "L'information des actionnaires et des investisseurs." Revue de Jurisprudence Commerciale: 15 ff.
- Dufour, C. and U. Rehfeldt (1991). "Existe-t-il un modèle européen de représentation des salariés dans l'entreprise." Travail et Emploi (14 ff).
- Easterbrook, F. and D. R. Fischel (1986). "Close corporations and agency costs." Stanford Law Review **38**(2): 271-301.
- Easterbrook, F. and D. R. Fischel (1986). "Close corporations and agency costs." Stanford Law Review **38**(2): 271-301.
- Easterbrook, F. and D. R. Fischel (1996). The Economic Structure of Corporate Law, Harvard University Press.
- Easterbrook, F. and D. R. Fischel (1996). The Economic Structure of Corporate Law, Harvard University Press.
- Ebke, W. (2004). Corporate Governance and Auditor Independence. Reforming Company and Takeover Law in Europe. G. Ferrarini, K. J. Hopt, J. Winter and E. Wymeersch. Oxford, Oxford University Press.
- Ebke, W. (2004). Corporate Governance and Auditor Independence. Reforming Company and Takeover Law in Europe. G. Ferrarini, K. J. Hopt, J. Winter and E. Wymeersch. Oxford, Oxford University Press.
- Ebke, W. and A. Jurisch (2000). "Der unerwünschte Abschlussprüfer: Ersetzungsverfahren (§319(3)HGB) vs Anfechtungsklage (§243 (1)AktG)." Die Aktiengesellschaft **45**: 208
- Edwards, T. (2004). "Corporate Governance, industrial relations and trends in company-level restructuring in Europe: convergence towards the Anglo-American model?" Industrial Relations Journal **35**(6): 518-535.
- Edwards, V. (1999). EC Company Law, Clarendon Press.
- Ehlers, M. (2008). "Personalkosten und Bündnisse für Arbeit." Recht der Arbeit **61**(2): 81-91.
- Eichengreen, B. (2006). Managing the world economy in the 1990s. The Global Economy in the 1990s: a long-run perspective. P. W. Rhode and G. Toniolo, Cambridge.
- Eichengreen, B. (2007). The European Economy since 1945 - coordinated capitalism and beyond Princeton University Press.
- Eichengreen, B. (2007). The European Economy since 1945 - coordinated capitalism and beyond Princeton University Press.
- Eisenberg, M. A. (1976). The structure of the corporation: a legal analysis. Boston, Little Brown.
- Eisenberg, M. A. (1999). "The Conception that the Corporation is a Nexus of Contracts and the Dual Nature of the Firm." Journal of Corporate Law **24**: 819-816.
- Eisenberg, M. A. (1999). "The Conception that the Corporation is a Nexus of Contracts and the Dual Nature of the Firm." Journal of Corporate Law **24**: 819-816.
- Ekstedt, E. (2007). A New Division of Labour: the "projectification" of working and industrial life.
- Ekstedt, E. (2007). A New Division of Labour: the "projectification" of working and industrial life.

- Elst, C. v. d. (2008). Shareholder mobility in five countries. ECGI Working Papers in Law, European Corporate Governance Institute.
- Erzegovesi, L. (2004). Soluzioni di rete per la finanzia delle piccole e medie imprese. Reti di imprese tra regolazine e norme sociali. Nuove sfide per diritto ed economia. F. Cafaggi, Il Mulino.
- Estrin, P. (1999). State ownership, corporate governance and privatisation. Corporate Governance, State Owned Enterprises and Privatisation. OCDE. Paris, OCDE.
- Ewing, K. D. and G. M. Truter (2005). "The Information and Consultation of Employees Regulations: voluntarism's bitter legacy." Modern Law Review **68**(4): 629-641.
- Falkner, G. (1996). "The Maastricht protocol on social policy: theory and practice." Journal of European Social Policy **6**(1): 1-16.
- Favennec-Héry, F. (2007). "La GPEC: l'environnement juridique." Droit Social: 1068-1073.
- Favennec-Héry, F. (2009). "La représentativité syndicale." Droit Social (6): 630-640.
- Fernandes de Oliveira, A. (2008). Responsabilidade Civil dos Administradores. Código das Sociedades Comerciais e Governo das Sociedades. P. Câmara, R. d. Oliveira Neves, A. Figueiredo, A. Fernandes de Oliveira and J. Ferreira Gomes, Almedina.
- Ferran, E. (2005). Company Law Reform in the UK: a progress report, European Corporate Governance Institute.
- Ferran, E. (2005). Company Law Reform in the UK: a progress report, European Corporate Governance Institute.
- Ferrarini, G. (2006). One share - One vote: a European rule?, European Corporate Governance Institute.
- Ferrarini, G. and N. Moloney (2004). Executive remuneration and Corporate Governance in the EU: convergence, divergence and reform perspectives. Reforming Company and Takeover Law in Europe. G. Ferrarini, K. J. Hopt, J. Winter and E. Wymeersch, Oxford.
- Ferrarini, G. and N. Moloney (2004). Executive remuneration and Corporate Governance in the EU: convergence, divergence and reform perspectives. Reforming Company and Takeover Law in Europe. G. Ferrarini, K. J. Hopt, J. Winter and E. Wymeersch, Oxford.
- Ferrarini, G., N. Moloney, et al. (2003). Executive Remuneration in the EU: Comparative Law and Practice, European Corporate Governance Institute.
- Ferreira Gomes, J. (2008). A responsabilidade civil dos auditores. Código das Sociedades Comerciais e Governo das Sociedades. P. Câmara, R. d. Oliveira Neves, A. Figueiredo, A. Fernandes de Oliveira and J. Ferreira Gomes, Almedina.
- Ferreira Gomes, J. (2008). A responsabilidade civil dos auditores. Código das Sociedades Comerciais e Governo das Sociedades. P. Câmara, R. d. Oliveira Neves, A. Figueiredo, A. Fernandes de Oliveira and J. Ferreira Gomes, Almedina.
- Figueiredo, A. (2008). Auditor Independence and the Joint Provision of Audit and Non-Audit Services. Código das Sociedades Comerciais e Governo das Sociedades. P. Câmara, R. d. Oliveira

- Neves, A. Figueiredo, A. Fernandes de Oliveira and J. Ferreira Gomes, Almedina.
- Figueiredo, A. (2008). Auditor Independence and the Joint Provision of Audit and Non-Audit Services. Código das Sociedades Comerciais e Governo das Sociedades. P. Câmara, R. d. Oliveira Neves, A. Figueiredo, A. Fernandes de Oliveira and J. Ferreira Gomes, Almedina.
- Fischel, D. R. (1984). "Labour markets and labour law compared with capital markets and capital law." University of Chicago Law Review **51**: 1061-1077.
- Fleischer, H. (2005). "Legal transplants in European Company Law - the case of Fiduciary Duties." European Company and Financial Law Review(3): 378-398.
- Frada de Sousa, A. (2008). The cross-border merger directive and the non-EU initiatives on the cross-border transfer of registered office, Europa Institute, Trier.
- Frada de Sousa, A. (2009). "Cartesio: regresso a Daily Mail e encerramento de um ciclo." Cadernos de Direito Privado.
- Freedman, D. (2001). "L'américanisation du droit français par la vie économique." Archives de Philosophie du Droit **45**: 207-211.
- Freedman, J. (2004). Limited Liability Partnerships in the United Kingdom: do they have a role for small firms. The Governance of Close Corporations and Partnerships. Us and European perspectives. J. A. McCahery, T. Raaijmakers and E. P. M. Vermeulen, Oxford.
- Frege, C. M. (2002). "A critical assesement of the theoretical and empirical research on German works councils." British Journal of Industrial Relations **40**(2): 221-248.
- Freitag, R. and M. Riemenschneider (2007). "Die Unternehmergeellschaft - "GmbH light" als konkurrenz für die Limited? ." Zeitschrift für Wirtschaftsrecht **32**: 1485-1492.
- Frenz, W. (2004). Handbuch Europarecht, Springer.
- Frenz, W. and V. Götzkes (2007). "Ein europäisches Grundrecht der Arbeitnehmerin und Arbeitnehmer auf Unterrichtung und Anhörung im Unternehmen?" Recht der Arbeit(4): 216-218.
- Freyssinet, J., H. Krieger, et al. (2005). Pacts for Employment and Competitiveness, European Foundation for the Improvement of Living and Working Conditions.
- Friedman, M. (1970). The Social Responsibility of Business is to Increase its Profits The New York Times Magazine.
- Fuchs, M. (2004). "The bottom line of European Labour Law." International Journal of Comparative Labour Law and Industrial Relations **20**(2 and 3): 155-176 and 423-444.
- Fuchs, M. (2004b). National report Germany. The evolving structure of collective bargaining in Europe. U. o. F. European Commission. Florence.
- Fuchs, M. (2004b). National report Germany. The evolving structure of collective bargaining in Europe. U. o. F. European Commission. Florence.
- Fukuyama, F. (1992). The End of History and the Last Man, Free Press.
- Funder, M. (1999). Paradoxien der Reorganisation - eine empirische Studie strategischer Dezentralisierung von

- Konzernunternehmen und ihrer Auswirkungen auf Mitbestimmung und Industrielle Beziehungen, Rainer Hampp Verlag.
- Funder, M. (1999). Paradoxien der Reorganisation - eine empirische Studie strategischer Dezentralisierung von Konzernunternehmen und ihrer Auswirkungen auf Mitbestimmung und Industrielle Beziehungen, Rainer Hampp Verlag.
- Gaudu, F. (2008)
- Gaumann, R. and M. Schafft (1998). "Tarifvertragliche Öffnungsklauseln - ein sinnvolles Flexibilisierungs instrument." Neue Zeitschrift für Arbeitsrecht(4): 177-187.
- Gauriau, B. (2009). "Les représentants des syndicats dans l'entreprise." Droit Social(6): 641-647.
- Gentz, M. (1998). Werden die geltenden Tarifverträge der betrieblichen Praxis gerecht? Tarifautonomie für ein neues Jahrhundert - festschrift für Günther Schaub zum 65 Geburtstag. M. Schlachter, R. Ascheid and H.-W. Friedrich. München, 1998: 205-217.
- Gilson, R. N. and B. Black (1995). The Law and Finance of Corporate Acquisitions, University Casebook series.
- Goergen, M., M. Martynova, et al. (2005). Corporate Governance Convergence: evidence from takeover regulation, European Corporate Governance Institute.
- Goergen, M., M. Martynova, et al. (2005). Corporate Governance Convergence: evidence from takeover regulation, European Corporate Governance Institute.
- Golden, J. B. and D. Fischer-Appelt (2004). The EU Prospectus and Transparency Directives - towards a unified European Capital Markets Regime. Corporate Law and Practice Handbook, Practice Law Institute.
- Gomes, J. (2001). A jurisprudência recente do TJCE em matéria de transmissão de empresa, estabelecimento ou parte de estabelecimento: inflexão ou continuidade? Estudos do Instituto de Direito do Trabalho. Lisboa, Almedina.
- Gomes, J. (2005). "Comentário de urgência ao acórdão do TJCE de 20.11.2003, proc. nº. C-340/01." Revista de Direito e Estudos Sociais: 213-219.
- Gomes, J. V. (2004). National Report Portugal. The evolving structure of collective bargaining in Europe 1990-2004. S. Sciarra. Florence, European Commission, University of Florence.
- Gomes, J. V. (2004). National Report Portugal. The evolving structure of collective bargaining in Europe 1990-2004. S. Sciarra. Florence, European Commission, University of Florence.
- Gomes, J. V. (2007). Direito do Trabalho - relações individuais. Porto, Coimbra.
- Gomes, J. V. (2007). Direito do Trabalho - relações individuais. Porto, Coimbra.
- Gonçalves da Silva, L. (2004). Princípios gerais da contratação colectiva no Código do Trabalho. Estudos de Direito do Trabalho, Almedina. I: 167 ff.

- Gonçalves da Silva, L. (2004). Princípios gerais da contratação colectiva no Código do Trabalho. Estudos de Direito do Trabalho, Almedina. I: 167 ff.
- Gordon, J. N. and M. J. Roe, Eds. (2004). Convergence and Persistence in Corporate Governance, Cambridge.
- Gospel, H. and A. Pendleton (2003). "Finance, Corporate Governance and the management of labour: a conceptual and comparative analysis." British Journal of Industrial Relations **41**(3): 557-582.
- Gospel, H. and A. Pendleton (2003). "Finance, Corporate Governance and the management of labour: a conceptual and comparative analysis." British Journal of Industrial Relations **41**(3): 557-582.
- Gospel, H. and A. Pendleton (2005). Markets and Relationships: Finance, Governance and Labour in the United Kingdom. Corporate Governance and Labour Management: an international comparison H. Gospel and A. Pendleton, Oxford.
- Gospel, H. and A. Pendleton (2005). Markets and Relationships: Finance, Governance and Labour in the United Kingdom. Corporate Governance and Labour Management: an international comparison H. Gospel and A. Pendleton, Oxford.
- Gospel, H. and A. Pendleton, Eds. (2005). Corporate Governance and Labour Management - an international comparison, Oxford.
- Gospel, H. and A. Pendleton, Eds. (2005). Corporate Governance and Labour Management - an international comparison, Oxford.
- Gower, L. C. B. (1997). Gower's Principles of Modern Company Law, Sweet & Maxwell.
- Gower, L. C. B. (1997). Gower's Principles of Modern Company Law, Sweet & Maxwell.
- Goyer, M. (2002). The transformation of Corporate Governance in France and Germany: the role of workplace institutions, Max Planck Institute für Gesellschaftsforschung.
- Goyer, M. (2002). The transformation of Corporate Governance in France and Germany: the role of workplace institutions, Max Planck Institute für Gesellschaftsforschung.
- Goyer, M. (2007). Institutional Investors in French and German Corporate Governance: The Transformation of Corporate Governance and the Stability of Coordination
- Goyer, M. (2007). Institutional Investors in French and German Corporate Governance: The Transformation of Corporate Governance and the Stability of Coordination
- Goyer, M. and B. Hancké (2005). Labour in French Corporate Governance: the missing link. Corporate Governance and Labour Management: an international comparison. H. Gospel and A. Pendleton, Oxford.
- Goyer, M. and B. Hancké (2005). Labour in French Corporate Governance: the missing link. Corporate Governance and Labour Management: an international comparison. H. Gospel and A. Pendleton, Oxford.
- Goyer, M. and B. Hancké (2005). Labour in French Corporate Governance: the missing link. Corporate Governance and Labour Management: an international comparison. H. Gospel and A. Pendleton, Oxford.

- Guéry, G. (1999). Restructuration d'entreprises en Europe : dimension sociale, Université de Boeck.
- Gumbrel-McCormick, R. and R. Hyman (2006). "Embedded collectivism? Workplace representation in France and Germany." Industrial Relations Journal **37**(5): 473-491.
- Guyon, Y. (2001). "Présentation générale des réformes apportées au droit des sociétés par la loi du 15 mai 2001 relative aux nouvelles régulations économiques " Revue des Sociétés **119**: 503-515.
- Guyon, Y. (2002). "Les dispositions du décret du 3 mai 2002 relatives aux assemblées générales d'actionnaires." Revue des Sociétés **120**: 421-429.
- Guyon, Y. (2002). "Les dispositions du décret du 3 mai 2002 relatives aux assemblées générales d'actionnaires." Revue des Sociétés **120**: 421-429.
- Habersack, M. (1999). Europäisches Gesellschaftsrecht, C.H. Beck.
- Habersack, M. (1999). Europäisches Gesellschaftsrecht, C.H. Beck.
- Hall, M. (1996). "Beyond recognition: employee representation and EU Law." Industrial Law Journal **25**(1): 15-27.
- Hall, M. (1999). Trade Union Recognition and the Employment Relations Bill, EIRO.
- Hall, M. (2006). "A cool response to the ICE regulations? Employer and Trade Union approaches to the new legal framework for information and consultation." Industrial Relations Journal **37**(5): 456-472.
- Hall, P. and D. Sokice, Eds. (2001). Varieties of capitalism: the institutional foundations of comparative advantage. Oxford, Oxford University Press.
- Hall, P. and D. Sokice, Eds. (2001). Varieties of capitalism: the institutional foundations of comparative advantage. Oxford, Oxford University Press.
- Hamann, D. (2009). "Iura novit Curia and the Principle of Equal Treatment of Shareholders." European Law Reporter(4): 152 ff.
- Hanau, P. (1998). "Der Tarifvertrag in der Krise." Recht der Arbeit **51**(2): 65-71.
- Hannoun, C. (2008). L'impact de la financiarisation de l'economie sur le droit du travail. Le droit du travail à l'épreuve de la mondialisation. A. Lyon-Caen and Q. Urban, Dalloz: 35-51.
- Hansmann, H. (1993). "Worker participation and corporate governance." University of Toronto Law Journal **43**: 589-606.
- Hansmann, H. (1993). "Worker participation and corporate governance." University of Toronto Law Journal **43**: 589-606.
- Hansmann, H. (1993). Probleme von kollektiventscheidungen und Theorie der Firma. Ökonomische Analyse des Unternehmensrechts. C. Ott and H.-B. Schäffer, Physika Verlag: 287-305.
- Hansmann, H. (1996). Comments. Employees and Corporate Governance. Columbia Law School.
- Hansmann, H. (2004). Corporation and Contract. Annual Meeting of the American Law and Economics Association Yale.
- Hansmann, H. (2004). Corporation and Contract. Annual Meeting of the American Law and Economics Association Yale.

- Hansmann, H. and R. Kraakman (2000). "The essential role of organizational law." Yale Law Journal **110**(3): 387 ff.
- Hansmann, H. and R. Kraakman (2000). "The essential role of organizational law." Yale Law Journal **110**(3): 387 ff.
- Hansmann, H. and R. Kraakman (2000). The end of history for corporate law. Program for studies in law, economics and public policy, Yale Law School.
- Hansmann, H. and R. Kraakman (2000). The end of history for corporate law. Program for studies in law, economics and public policy, Yale Law School.
- Hansmann, H. and R. Kraakman (2002). Towards a single model of corporate law. Corporate Governance regimes: convergence and diversity. J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneboog, Oxford.
- Happ, W. (2005). "Deregulierung der GmbH im Wettbewerb der Rechtsformen." Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht **169**(1): 6-34.
- Harbula, P. (2008). "The ownership structure, governance and performance of French companies." Journal of Applied Corporate Finance **19**(1): 88-101.
- Harbula, P. (2008). "The ownership structure, governance and performance of French companies." Journal of Applied Corporate Finance **19**(1): 88-101.
- Hassel, A. (1999). "The erosion of the German system of Industrial Relations." British Journal of Industrial Relations **37**(3): 483-505.
- Hassiotis, A. (2000). Die entwicklung des rechts der Arbeitnehmervertretung auf Information und Consultation in der Europäischen union - unter berücksichtigung des deutschen, französischen, britischen und schweizerischen rechts, Schulthess Juristische Medien AG Zürich / Verlag Stämpfli+Cie Bern
- Heidenreich, M. (1998). "Die organisation von Arbeit in der Wissensgesellschaft " Industrielle Beziehungen **5**(1): 13-44.
- Helfert, M. (1992). "Betriebsverfassung, neue Rationalisierungsformen, lean production." WSI-Mitteilungen **8**: 505-521.
- Henssler, M. (1994). "Flexibilisierung der Arbeitsmarktordnung." Zeitschrift für Arbeitsrecht: 487 ff.
- Henssler, M. (1998). "Firmentarifverträge und Unternehmensbezogene Verbandstarifverträge als instrument einer "flexiblen" Betriebsnahen Tarifpolitik." Zeitschrift für Arbeitsrecht **29**(4): 517-542.
- Henssler, M. (2003). Unternehmerische Mitbestimmung in der Societas Europaeae – Neue Denkanstöße für die "Corporate Governance" Diskussion. Festschrift für Peter Ulmer. M. Habersack, De Gruyter Recht.
- Herkommer, S. (1996). Lean production: between myth and reality. Changing Europe: some aspects of identity, conflict and social justice. A. Erskine, M. Elchardus, S. Herkommer and J. Ryan, Avebury.
- Herkommer, S. (1996). Lean production: between myth and reality. Changing Europe: some aspects of identity, conflict and social justice. A. Erskine, M. Elchardus, S. Herkommer and J. Ryan, Avebury.

- Herrmann, K. K. (2004). "Corporate Social Responsibility and Sustainable Development: the European Union as a case-study." Industrial Journal of Global Legal Studies **11**: 205-232.
- Hertig, G. and H. Kanda (2004). Related Party Transactions. The Anatomy of Corporate Law. H. Hansmann and R. Kraakman. Oxford, Oxford.
- Hertig, G. and J. A. McCahery (2004). An Agenda for Reform: Company and Takeover Law in Europe. Reforming Company and Takeover Law in Europe. G. Ferrarini, K. J. Hopt, J. Winter and E. Wymeersch, Oxford.
- Hertig, G. and J. A. McCahery (2006). Company and Takeover Law Reforms in Europe: Misguided Harmonisation Efforts or Regulatory Competition. After Enron : improving corporate law and modernising securities regulation in Europe and the US. J. Armour and J. A. McCahery, Hart.
- Hertig, G., R. Kraakman, et al. (2004). Issuers and Investor Protection. The Anatomy of Corporate Law. H. Hansmann and R. Kraakman, Oxford.
- Hertig, G., R. Kraakman, et al. (2004). Issuers and Investor Protection. The Anatomy of Corporate Law. H. Hansmann and R. Kraakman, Oxford.
- Hetherington, J. A. C. (1969). "Special characteristics, problems and needs of the close corporation." University of Illinois Law Review: 1-29.
- Hetherington, J. A. C. (1969). "Special characteristics, problems and needs of the close corporation." University of Illinois Law Review: 1-29.
- Higgs, D. (2002). Review of the role and effectiveness of non-executive directors, Department of Trade and Industry.
- Higgs, D. (2002). Review of the role and effectiveness of non-executive directors, Department of Trade and Industry.
- Hillebrandt, F. and R. Schremper (2001). "Analyse des Gleichbehandlungsgrundsatzes beim Rückkauf von Vorzugsaktien " Betriebs-beräter **56**(11): 532-538.
- Hirte, H. (2005). "The Takeover Directive - a mini-directive on the structure of the corporation: is it a Trojan horse?" European Company and Financial Law Review(1): 2-14.
- Hirte, H. (2005). "The Takeover Directive - a mini-directive on the structure of the corporation: is it a Trojan horse?" European Company and Financial Law Review(1): 2-14.
- Hommelhoff, P. (1998). "Die neue Position des Abschlussprüfers im Kraftfeld der Aktienrechtlichen Organisationsverfassung " Betriebs-beräter: 2567-2573; 2625-2632.
- Hommelhoff, P. and D. Mattheus (1998). "Corporate Governance nach dem KonTraG." Die Aktiengesellschaft **43**(6): 249-259.
- Höpner, M. (2003b). Wer beherrscht die Unternehmen? Shareholder value, Managerherrschaft und Mitbestimmung in Deutschland Campus Verlag.
- Höpner, M. (2005). Corporate Governance in transition: ten empirical findings on shareholder value and industrial relations in Germany, Max Planck Institute für Gesellschaftsforschung.

- Höpner, M. (2005). Corporate Governance in transition: ten empirical findings on shareholder value and industrial relations in Germany, Max Planck Institute für Gesellschaftsforschung.
- Höpner, M. (2005). Politisch-institutionelle Determinanten aktionärsorientierter Reformen, Max Planck Institute für Gesellschaftsforschung.
- Höpner, M. (2005b). "What connects Industrial Relations and Corporate Governance? Explaining institutional complementarity." Socio-Economic Review 3(2).
- Höpner, M. (2005b). "What connects Industrial Relations and Corporate Governance? Explaining institutional complementarity." Socio-Economic Review 3(2).
- Höpner, M. (2005b). "What connects Industrial Relations and Corporate Governance? Explaining institutional complementarity." Socio-Economic Review 3(2).
- Hopt, K. J. (2002). Common principles of Corporate Governance in Europe. Corporate Governance Regimes - convergence and diversity. J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneboog, Oxford.
- Hopt, K. J. (2003). Unternehmensführung, Unternehmenskontrolle, Modernisierung des Aktienrechts - zum Bericht der Kommission Corporate Governance Corporate Governance. P. Hommelhoff, M. Lutter, K. Schmidt, W. Schön and P. Ulmer. Heidelberg, Recht und Wirtschaft.
- Hopt, K. J. (2005). European Company Law and Corporate Governance: where does the Action Plan of the Commission lead?, ECGI - European Corporate Governance Institute.
- Hopt, K. J. (2006). Modern Company and Capital Market Problems: Improving European Corporate Governance After Enron. After Enron: improving corporate law and modernising securities regulation in Europe and in the US. J. Armour and J. A. McCahery, Hart.
- Hopt, K. J. (2007). "Feindliche übernahmen, protektionismus, one share one vote?" Europäische Zeitschrift für Wirtschaftsrecht 18(9): 257.
- Hopt, K. J. and P. C. Leyens (2004). Board Models in Europe. Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy., European Corporate Governance Institute.
- Hudson, M., Suzanne Konzelmann, et al. (2002). Partnership in practice, ESRC Centre for Business Research, University of Cambridge.
- Hueck, G. (2007). Gesellschaftsrecht, C.H Beck.
- Hueck, G. (2007). Gesellschaftsrecht, C.H Beck.
- Hüffer, U. (1995). Aktiengesetz Kommentar, C.H Beck.
- Hunold, W. (1993). Lean Production: rechtsfragen bei der Einführung neuer arbeitsformen und techniken, C.H. Beck.
- Hunold, W. (1993). Lean Production: rechtsfragen bei der Einführung neuer arbeitsformen und techniken, C.H. Beck.
- Hutchinson, E. A. S. and R. C. H. Thomas (1982). Company Law in Europe: the Vth Directive and the Harmonisation Programme, Institute of Directors.
- Hyman, R. (2007). Labour Markets and the Future of "Decommodification". Social Embedding and the Integration of

- Markets. O. Jacobi, M. Jepsen, B. Keller and M. Weiss, Hans Böckler Stiftung.
- Iamiceli, P. (2004). Le reti di imprese: modelli contrattuali di coordinamento. Reti di imprese tra regolazione e norme e sociali. F. Cafaggi, Il Mulino.
- Igalens, J. (2007). "La GPEC: intérêts et limites pour la gestion du personnel." Droit Social: 1074-1080.
- Isaksson, M. and R. Skog, Eds. (1994). Aspects of Corporate Governance Juristförlaget.
- Jackson, G., M. Höpner, et al. (2005). Corporate Governance and Employees in Germany: changing linkages, complementarities and tensions. Corporate Governance and Labour Management: an international comparison. H. Gospel and A. Pendleton, Oxford.
- Jackson, G., M. Höpner, et al. (2005). Corporate Governance and Employees in Germany: changing linkages, complementarities and tensions. Corporate Governance and Labour Management: an international comparison. H. Gospel and A. Pendleton, Oxford.
- Jacoby, S. M. (2002). "Corporate Governance in Comparative Perspective. Prospects for Convergence." Comparative Labor Law and Policy Journal **22**(1).
- Janning, F., Ed. (2002). Abschied von der Hierarchie - dezentralisierung in mittelständischen Unternehmen München und Meering, Rainer Hampp Verlag.
- Janning, F., Ed. (2002). Abschied von der Hierarchie - dezentralisierung in mittelständischen Unternehmen München und Meering, Rainer Hampp Verlag.
- Jensen, M. and W. Meckling (1976). "The Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure." Journal of Financial Economy **3**.
- Jobert, A. and J. Saglio (2004). "Ré-institutionnaliser la négociation collective en France." Travail et Emploi(100): 113-127.
- Johnston, A. (2003). Theories of the Company, Employees and Takeover Regulation Law. Florence, European University Institute. **Doctor of Laws**.
- Joost, D. (2007). "Unternehmergesellschaft, Unterbilanz, Verlustanzeige." ZIP **48**: 2242-2248.
- Julliot, S. (2005). Les turbulences au sein du double canal de représentation en France. Recomposition des systèmes de représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne.
- Jürgens, U. and J. Rupp (2002) "The German system of Corporate Governance: characteristics and changes." DOI: FS II 02-203.
- Jürgens, U. and J. Rupp (2002) "The German system of Corporate Governance: characteristics and changes." DOI: FS II 02-203.
- Jürgens, U. and J. Rupp (2002) "The German system of Corporate Governance: characteristics and changes." DOI: FS II 02-203.
- Jürgens, U., D. Sadowski, et al., Eds. (2007). Perspektiven der Corporate Governance, Nomos-Nomos.
- Jürgens, U., J. Rupp, et al. (2000). Corporate Governance and Shareholder Value in Deutschland, Wissenschaftszentrum Berlin für Sozialforschung.

- Justiz, B. d. (2008). Schwerpunkte des Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Mißbräuchen (MoMiG). B. d. Justiz.
- Kahan, M. and E. B. Rock (2006). Hedge funds in Corporate Governance and Corporate Control, European Corporate Governance Institute.
- Karmel, R. S. (2005). "Reform of Public Company Disclosure in Europe." University of Pennsylvania Journal of International Economic Law **26**(3).
- Kellerhals, A. and D. Trüten (2002). "The creation of the European company." Tulane European and Civil Law Forum(17): 71-80.
- Kirr, B. Corporate Governance und Arbeitsbeziehungen in Deutschland, Großbritannien und Polen.
- Kittner, M. (1998). Öffnung des Flächentarifvertrags. Tarifautonomie für ein neues Jahrhundert - festschrift für Günther Schaub zum 65 Geburtstag. M. Schlachter, R. Ascheid and H.-W. Friedrich. München, C.H Beck: 389-420.
- Kittner, M. (1998). Öffnung des Flächentarifvertrags. Tarifautonomie für ein neues Jahrhundert - festschrift für Günther Schaub zum 65 Geburtstag. M. Schlachter, R. Ascheid and H.-W. Friedrich. München, C.H Beck: 389-420.
- Kluth, W. (1997). "Abschaffung von Mehrstimmrechtsaktien verfassungswidrig?" ZIP(28): 1217-1224.
- König, K.-M. (2004). "Die neue europäische Prospekttrichtlinie. Eine kritische Analyse und Überlegungen zur Umsetzung in das deutsche Kapitalmarktrecht." Zeus(2): 251-288.
- Kraakman, R. (1994). "When are shareholder suits in shareholder interests?" Georgetown Law Journal **82**: 1733 ff.
- Kraakman, R., P. Davies, et al. (2004). The Anatomy of Corporate Law: a Comparative and Functional Approach, Oxford.
- Kraakman, R., P. Davies, et al. (2004). The Anatomy of Corporate Law: a Comparative and Functional Approach, Oxford.
- Kriebel, V. (1984). Zentralisation und dezentralisation im Tarifsysteem - möglichkeit und rechtliche Zulässigkeit einer dezentralisierten Tarifpolitik Berlin, Duncker & Humblot.
- La Nabasque, H. (1999). "Le développement du devoir de loyauté en droit des sociétés." Revue Trimestrielle de Droit Commerciale: 273 ff.
- La Nabasque, H. (2001). "La SAS et la loi sur les nouvelles régulations économiques." Revue des sociétés **119**: 589-616.
- La Porta, R., F. Lopes-de-Silanes, et al. (1999). "Corporate ownership around the world." The Journal of Finance **54**(2): 471-517.
- La Porta, R., F. Lopes-de-Silanes, et al. (1999). "Corporate ownership around the world." The Journal of Finance **54**(2): 471-517.
- Laborde, J.-P. (2007). Closer to involvement than to participation: the role of employees in decision-making in large companies and enterprises in general according to French labour law. . Perspektiven der Corporate Governance. U. Jürgens, D. Sadowski, G. F. Schupert and M. Weiss, Nomos-Nomos.
- Laulom, S. (2005). Le cadre communautaire de la représentation des travailleurs dans l'entreprise. Recomposition des systèmes de

- représentation des salariés en Europe. S. Laulom, Publications de l'Université de Saint-Étienne.
- Laulom, S., Ed. (2005). Recomposition des systèmes de représentation des salariés en Europe. Saint-Étienne, Publications de l'Université de Saint-Étienne.
- Lawlor, D. G. (2007). "Reform der englischen Limited und ihre praktischen Auswirkungen " ZIP **47**(2002-2005).
- Lawrence, P. (1980). Managers and management in West-Germany. London, Croomhelm.
- Lee, J. (2007). "Shareholders' derivative claims under the Companies Act 2006: market mechanism or asymmetric paternalism." International Company and Commercial Law Review **18**(11): 378-392.
- Leite, J. (2004). Direito do Trabalho. Coimbra, Serviços de Acção Social da Universidade de Coimbra.
- Lessner, J. (2005). "Chancen dezentraler Tarifpolitik - herausforderungen für die gewerkschaftliche Willensbildung." Recht der Arbeit(5): 285-294.
- Leyens, P. C. (2007). "Corporate Governance: Grundsatzfragen und Forschungsperspektiven." Juristen Zeitung **26**(22): 1061-1112.
- Lingemann, S. and D. Wasmann (1998). "Mehr Kontrolle und Transparenz im Aktienrecht: Das KonTraG tritt in Kraft " Betriebsberater **53**(17): 853-862.
- Lingemann, S. and D. Wasmann (1998). "Mehr Kontrolle und Transparenz im Aktienrecht: Das KonTraG tritt in Kraft " Betriebsberater **53**(17): 853-862.
- Lobo Xavier, B. (2004). Curso de Direito do Trabalho, Verbo.
- Lobo Xavier, B. (2004). Curso de Direito do Trabalho, Verbo.
- Lobo Xavier, B. (2004). Curso de Direito do Trabalho, Verbo.
- Lorber, P. (2006). "Implementint the Information and Consultation Directive in Great Britain: a new voice at work." International Journal of Comparative Labour Law and Industrial Relations **22**(2): 231-258.
- Lorenz, E. (1995). "Promoting workplace participation: lessons from Germany and France." Industrielle Beziehungen **2**(1): 46-63.
- Löwisch, M. (1997). "Tariföffnung bei Unternehmens- und Arbeitsplatzgefährdung." Neue Juristische Wochenschrift(14): 905-911.
- Macey, J. R. (2008). Corporate Governance - promises kept, promises broken, Princeton University Press.
- Magnier, V. (2001). "Réception du droit américain dans l'organisation des sociétés commerciales " Archives de Philosophie du Droit **45**: 213-225.
- Mann, A. (2003). Corporate Governance systeme - funktion und entwicklung am beispiel von Deutschland und Großbritannien, Duncker & Humblot.
- Mann, A. (2003). Corporate Governance systeme - funktion und entwicklung am beispiel von Deutschland und Großbritannien, Duncker & Humblot.
- Marhold, F. and M. Fuchs (2001). Europäisches Arbeitsrecht. Wien, Springer.

- Maul, S. (2005). Gesellschaftsrechtliche Entwicklungen in Europa - bruch mit deutschen traditionen. Rechtsfragen der europäischen integration. Bonn, Zentrum für europäisches wirtschaftsrecht.
- Mazeaud, A. (2006). Droit du Travail, Montchrestien.
- Mazeaud, A. (2006). Droit du Travail, Montchrestien.
- Mazeaud, A. (2009). "La négociation des accords d'entreprise en l'absence de délégué syndical." Droit Social(6): 669-678.
- McCahery, J. A. and E. P. M. Vermeulen (2004). The evolution of closely held business forms in Europe. The Governance of Close Corporations and Partnerships. US and European Perspectives. J. A. McCahery, T. Raaijmakers and E. P. M. Vermeulen, Oxford.
- McCahery, J. A., E. P. M. Vermeulen, et al. (2006). The new company law: what matters in an innovative economy, European Corporate Governance Institute.
- McCahery, J. A., E. P. M. Vermeulen, et al. (2006). The new company law: what matters in an innovative economy, European Corporate Governance Institute.
- McCarthy, W. E. J. and N. D. Ellis (1973). Management by agreement - an alternative to the Industrial Relations Act Hutchinson of London.
- Menezes Cordeiro, A. and P. Câmara, Eds. (2007). Jornadas de Homenagem ao Prof. Raúl Ventura. A Reforma do Código das Sociedades Comerciais Almedina.
- Menezes Leitão, L. (2007). Voto por correspondência e realização telemática de reuniões de órgãos sociais. A reforma do Código das Sociedades Comerciais: jornadas em homenagem ao Prof. Raul Ventura. A. Menezes Cordeiro and P. Câmara. Lisbon, Almedina.
- Menezes Leitão, L. (2007). Voto por correspondência e realização telemática de reuniões de órgãos sociais. A reforma do Código das Sociedades Comerciais: jornadas em homenagem ao Prof. Raul Ventura. A. Menezes Cordeiro and P. Câmara. Lisbon, Almedina.
- Menezes Leitão, M. J. (2001). "General features of collective bargaining in Portugal " International Journal of Comparative Labour Law and Industrial Relations: 441 ff.
- Menezes Leitão, M. J. (2001). "General features of collective bargaining in Portugal " International Journal of Comparative Labour Law and Industrial Relations: 441 ff.
- Menjucq, M. (2006). Corporate Governance Issues in France. Corporate Governance Post-Enron. Comparative and International Perspectives. J. Norton, J. Rickford and J. Kleineman, British Institute of International and Comparative Law.
- Menjucq, M. (2006). Corporate Governance Issues in France. Corporate Governance Post-Enron. Comparative and International Perspectives. J. Norton, J. Rickford and J. Kleineman, British Institute of International and Comparative Law.
- Merle, P. (2008). Droit Commercial. Sociétés commerciales, Dalloz.
- Merle, P. (2008). Droit Commercial. Sociétés commerciales, Dalloz.
- Mestre, B. (2007). "The ruling CGT & others vs Ministre de l'emploi. Commission vs UK revisited." European Law Reporter(4).

- Mestre, B. (2009). The Right to Information and Consultation of the Workforce: context and content of a fundamental right. The Fundamentalisation of Social Rights. M.-A. Moreau and B. d. Witte. Florence, European University Institute.
- Mestre, J. and M.-E. Pancrazi (2003). Droit Commercial: droit interne et aspects de droit international. Paris, LGDJ.
- Ministério do Trabalho e da Solidariedade Social (2006). Livro Verde sobre as Relações Laborais.
- Molitor, K. (1998). Ende oder Reform der Flächentarifverträge? Tarifautonomie für ein neues Jahrhundert - festschrift für Günther Schaub zum 65 Geburtstag. M. Schlachter, R. Ascheid and H.-W. Friedrich. München, C.H Beck: 487-496.
- Monks, R. A. G. (2002). "Creating value through corporate governance." Corporate Governance 10(3): 116-123.
- Monks, R. A. G. and N. Minow (1995). Corporate Governance, Blackwell Business.
- Monteiro Fernandes, A. (2004). Direito do Trabalho, Almedina.
- Monteiro Fernandes, A. (2004). Direito do Trabalho, Almedina.
- Moreau, M.-A. (2001). "L'implication des travailleurs dans la société européenne." Droit Social: 967-976.
- Moreau, M.-A. (2004). National Report France. The Evolving Structure of Collective Bargaining in Europe. S. Sciarra. Florence, European Commission, University of Florence.
- Moreau, M.-A. (2004). National Report France. The Evolving Structure of Collective Bargaining in Europe. S. Sciarra. Florence, European Commission, University of Florence.
- Moreau, M.-A. (2006). "Restructurations et Comité d'Entreprise Européen." Droit Social(March).
- Moreau, M.-A. (2006). Normes sociales, droit du travail et mondialisation, Dalloz.
- Moreau, M.-A. (2007). The originality of transnational social norms as a response to globalisation. Regulating Labour in the Wake of Globalisation. New challenges, new institutions. B. Bercusson and C. Estlund, Columbia.
- Moreau, M.-A. (2008). Les échanges entre les droits, l'expérience communautaire - une lecture des phénomènes de régionalisation et de mondialisation du droit Collection Droit de L'Union Européenne. S. Robin-Olivier and D. Fasquelle.
- Moreau, M.-A. (2008). Les échanges entre les droits, l'expérience communautaire - une lecture des phénomènes de régionalisation et de mondialisation du droit Collection Droit de L'Union Européenne. S. Robin-Olivier and D. Fasquelle.
- Morel, F. (2009). "La rénovation de la démocratie sociale: vers une société de dialogue." Droit Social(9/10): 885-886.
- Morin, F. (1999). The privatisation process and corporate governance: the French case. Corporate Governance, State Owned Enterprises and Privatisation. OCDE. Paris, OCDE.
- Morin, F. (2000). "A transformation in the French model of shareholding and management
- Morin, F. and E. Rigamonti (2002). "Évolution et structure de l'actionnariat en France." Revue Française de Gestion 5(141): 155-181.

- Morin, F. and E. Rigamonti (2002). "Évolution et structure de l'actionnariat en France." Revue Française de Gestion 5(141): 155-181.
- Morin, M.-L. (1994). "Sous-traitance et relations salariales. Aspects de droit du travail." Travail et Emploi 60(3): 23-43.
- Morin, M.-L. (1996). "L'articulation des niveaux de négociation dans l'accord interprofessionnel sur la politique contractuelle." Droit Social: 11-18.
- Morin, M.-L. (2005). "Labour Law and new forms of corporate organisation." International Labour Review 144(1): 5-30.
- Morse, G. (2004). Limited Liability Partnerships and Partnership Law Reform in the United Kingdom. The Governance of Close Corporations and Partnerships. US and European Perspectives. J. A. McCahery, T. Raaijmakers and E. P. M. Vermeulen, Oxford.
- Mota Pinto, A. (2007). The Europeanisation of legal capital: searching for new ways of protecting creditors in limited liability companies. Law. Florence, European University Institute. **PhD**.
- Moura Ramos, L. and R. Martins (2002). Privatisation in Portugal: Employee Owners or Just Happy Employees? . G. d. E. M. e. Financeiros. Coimbra, Faculdade de Economia da Universidade de Coimbra.
- Moura Ramos, L. and R. Martins (2002). Privatisation in Portugal: Employee Owners or Just Happy Employees? . G. d. E. M. e. Financeiros. Coimbra, Faculdade de Economia da Universidade de Coimbra.
- Mouret, J. (2007). Collective Relations in France: a multi-layered system in mutation. Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives. R. Blainpain, Kluwer: 41-65.
- Mouret, J. (2007). Collective Relations in France: a multi-layered system in mutation. Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives. R. Blainpain, Kluwer: 41-65.
- Mückenberger, U. and H.-H. Lühr (1980). "Dokumentation zum Rationalisierungsschutz." Kritische Justiz 13(84-102).
- Nagel, B. (2001). Tarifstrukturen und Zukunft des Flachentarifvertrages im Deutschland. Ökonomische Analyse des Arbeitsrechts. C. Ott and H.-B. Schäffer, Mohr Sibeck.
- Natzel, I. (2001). "Die delegation von aufgaben an Arbeitsgruppen nach dem neuen §28a BetrVG." Der Betrieb(25): 1362-1364.
- Neau-Leduc, C. (2007). "Les sanctions de la GPEC." Droit Social: 1081-1085.
- Nietsch, M. (2005). "Corporate Governance and Company Law Reform - a German perspective." Corporate Governance 13(3): 368-376.
- Noack, U. (2006). "Der Vorschlag für eine Richtlinie über Rechte von Aktionären börsennotierter Gesellschaften " Neue Zeitschrift für Gesellschaftsrecht: 321 ff.
- Noack, U. and D. Zetzsche (2006). "Die Informationsanfechtung nach der Neufassung des §243Abs4 AktG." ZHR(218-246).
- Noack, U. and D. Zetzsche (2006). "Die Informationsanfechtung nach der Neufassung des §243Abs4 AktG." ZHR(218-246).

- Norton, J., J. Rickford, et al., Eds. (2006). Corporate Governance Post-Enron. Comparative and International Perspectives, British Institute of International and Comparative Law.
- Nunes de Carvalho, A. (1996). "Primeiras notas sobre a contratação colectiva atípica." Revista de Direito e de Estudos Sociais **14**: 9-36.
- Nunes, J. and L. Montanheiro (1997). "Privatisation in Portugal: an insight into the effects of a new political strategy." Competitiveness Review **7**(2): 59-78.
- Nunes, P. C. (2005). Corporate Governance. Lisboa, Almedina.
- O'Connor, M. (1993). "The Human Capital Era: reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation " Cornell Law Review **78**.
- OECD (1999). Corporate Governance, State Owned Enterprises and Privatisation, OECD.
- Oliner, S. D. and D. E. Sichel (2000). "The resurgence of growth in the late 1990s: is information technology the story?" Journal of Economic Perspectives **14**: 3-22.
- Oliveira Neves, R. d. (2008). O Administrador Independente. Código das Sociedades Comerciais e Governo das Sociedades. P. Câmara, R. d. Oliveira Neves, A. Fernandes de Oliveira and J. Ferreira Gomes, Almedina.
- Oliveira Neves, R. d. (2008). O Administrador Independente. Código das Sociedades Comerciais e Governo das Sociedades. P. Câmara, R. d. Oliveira Neves, A. Fernandes de Oliveira and J. Ferreira Gomes, Almedina.
- Olivier, J.-M. (2009). "Rapport de synthèse." Droit Social(6): 687-698.
- Orlandini, G. (2004). Diritto del lavoro e regolazione delle reti. Reti di imprese tra regolazione e norme sociali. Nuove sfide per diritto ed economia. F. Cafaggi, Il Mulino.
- Palley, T. I. (2007). Financialisation: what it is and why it matters Washington D.C, Economics for Democratic and Open Societies.
- Parkinson, J. (2003). "Models of the company and the employment relationship." British Journal of Industrial Relations **41**(3): 481-509.
- Pélissier, J., A. Supiot, et al. (2008). Droit du Travail, Dalloz.
- Pélissier, J., A. Supiot, et al. (2008). Droit du Travail, Dalloz.
- Pellens, B. and F. Hillebrandt (2001). "Vorzugsaktien vor dem Hintergrund der Corporate Governance-Discussion." Die Aktiengesellschaft **46**(2): 57-67.
- Pellens, B. and F. Hillebrandt (2001). "Vorzugsaktien vor dem Hintergrund der Corporate Governance-Discussion." Die Aktiengesellschaft **46**(2): 57-67.
- Peltier, F. (1997). "La convergence du droit français avec les principes de la Corporate Governance américaine." Revue du Droit Bancaire et de la Bourse **60**: 53 ss.
- Peltier, F. (1997). "La convergence du droit français avec les principes de la Corporate Governance américaine." Revue du Droit Bancaire et de la Bourse **60**: 53 ss.
- Perulli, A. (2007). "Diritto del lavoro e decentramento produttivo in una prospettiva comparata: problema e prospettive." Rivista Italiana di Diritto del Lavoro(I): 29-65.

- Perulli, A. (2008). Marché sans droit. Le droit du travail à l'épreuve de la globalisation. A. Lyon-Caen and Q. Urban, Dalloz: 53-59.
- Peters, T. J. and R. H. Waterman (1982). In Search of Excellence Profile Business.
- Petrovski, M. and D. Paucard "Les accords de méthode et leur impact sur les procédures d'information et de consultation des représentants du personnel : quelques résultats à partir de huit études de cas." Revue de L'IRES **50**(1): 103-136.
- Peyrevalade, J. (1999). "Le gouvernement d'entreprise ou les fondements incertains d'un nouveau pouvoir? ." Economica.
- Poole, M., Roger Mansfield, et al. (2005). "British managers' attitudes and behaviour in industrial relations: a twenty year study." British Journal of Industrial Relations **43**(1): 117-134.
- Posner, R. A. (2007). Economic analysis of law, Aspen.
- Powell, W. W. (2001). The Capitalist Firm in the Twenty-First Century:emerging patterns in western entreprise. The Twenty-First Century Firm: Changing Economic Organisation in International Perspective. P. DiMaggio, Princeton University Press.
- Powell, W. W. (2001). The Capitalist Firm in the Twenty-First Century:emerging patterns in western entreprise. The Twenty-First Century Firm: Changing Economic Organisation in International Perspective. P. DiMaggio, Princeton University Press.
- Power, D., G. Epstein, et al. (2003). Trends in the rentier income-share in OECD countries, 1960-2000, Department of Economics,
- Power, D., G. Epstein, et al. (2003). Trends in the rentier income-share in OECD countries, 1960-2000, Department of Economics,
- Prétot, X. (1994). "Le Conseil constitutionnel et la participation des travailleurs." Droit Social(2): 139-141.
- PriceWaterHouse Coopers and BDI (2005). Corporate Governance im Deutschland. Entwicklungen und Trends von Internationalem Intergrund.
- Raab, T. (2004). "Betriebliche Bündnisse für Arbeit - königsweg aus der Beschäftigungskrise?" Zeitschrift für Arbeitsrecht **35**(3): 371-403.
- Raiser, T. (2007). Aktionärsklagen. Aktienrecht im Wandel - Grundsatzfragen des Aktienrechts. W. Bayer and M. Habersack, Mohr Siebeck.
- Rajan, R. G. and L. Zingales (2003). "The great reversals: the politics of financial development in the 20th century." Journal of Financial Economics **69**: 5-50.
- Rao, J. M. and A. Krishna Dutt (2002). A decade of Reforms: the Indian Economy in the 1990s.
- Rappaport, A. (1986). Shareholder value - the new standard for business performance. New York, The Free Press.
- Ravaran, A. d. (2006). "Négocier les restructurations après la loi du 18 janvier 2005: aspects pratiques " Droit Social(3): 298-302.
- Ray, J.-E. (1994). "Regard sur un lifting législatif nécessaire (articles 24 à 32, relatifs aux institutions représentatives du personnel)." Droit Social(2): 142-146.
- Ray, J.-E. (2004). "Les curieux accords dits "majoritaires" de la loi du 4 mai 2004 " Droit Social(6): 590-600.

- Ray, J.-E. (2006). Droit du Travail - droit vivant, Editions Liaisons.
- Ray, J.-E. (2006). Droit du Travail - droit vivant, Editions Liaisons.
- Ray, J.-E. (2008). "Quel droit pour la négociation collective de demain?" Droit Social(1): 3-15.
- Reichert, J. (2000). Aktionärsrechte und Anlegerschutz - Stellungnahme zu den Vorschlägen der Corporate Governance Kommission Corporate Governance. P. Hommelhoff, M. Lutter, K. Schmidt, W. Schön and P. Ulmer. Heidelberg, Recht und Wirtschaft.
- Reichold, H. (2003). "Durchbruch zu einer europäischen Betriebsverfassung - die Rahmenrichtlinie 2002/14/EG zur Unterrichtung und Anhörung der Arbeitnehmer." Neue Zeitschrift für Arbeitsrecht **20**(6): 289-299.
- Reisberg, A. (2007). Derivative actions and corporate governance, Oxford
- Rémy, P. (2004). Une redistribution des competences entre syndicats et conseils d'etablissement en Allemagne. Récomposition des systèmes de representation des salariés en Europe. S. Laulom, Publications de l'Université de Saint Étienne.
- Rhode, P. W. and G. Toniolo, Eds. (2006). The Global Economy in the 1990s Cambridge.
- Richardi, R. and O. Wlotzke (2000). Münchener Handbuch zum Arbeitsrecht. München, C.H Beck.
- Rickford, J. (2004b). "The emerging european Takeover Law from a British perspective." European Business Law Review: 1379-1421.
- Rickford, J. (2004b). "The emerging european Takeover Law from a British perspective." European Business Law Review: 1379-1421.
- Rico, L. (1987). "The new industrial relations: British electricians' new style agreements." Industrial and Labor Relations Review **41**(1): 63-78.
- Rieble, V. (1996). "Krise des Flächentarifvertrages?" Recht der Arbeit **49** (3): 151-158.
- Rieble, V. (1999). "Bündnis für Arbeit - "Dritter weg" oder Sackgasse?" Recht der Arbeit **52**(3): 169-177.
- Rieble, V. (2004). "Die akteure im kollektiven Arbeitsrecht." Recht der Arbeit **57**(2): 78-86.
- Rieble, V. (2004b). "Öffnungsklauseln und Tarifverantwortung." Zeitschrift für Arbeitsrecht **35**(3): 405-429.
- Ripert, G. and R. Roblot (1996). Traité de Droit Commercial, LGDJ.
- Robert, L. (2004). "Betriebliche Bündnisse für Arbeit versus Tarifautonomie?" Neue Zeitschrift für Arbeitsrecht(12): 633-640.
- Rock, E. B. and M. L. Wachter (2004). Waiting for the omelet to set: match-specific assets and minority oppression in close corporations. The governance of close corporations and partnerships. J. A. Mcmahery, T. Raaijmakers and E. P. M. Vermeulen, Oxford: 93-133.
- Rock, E. B., H. Kanda, et al. (2004). Significant Corporate Actions. The Anatomy of Corporate Law. R. Kraakman and H. Hansmann, Oxford University Press.
- Romano Martinez, P. (2008). Direito do Trabalho, Almedina.
- Romano Martinez, P. (2008). Direito do Trabalho, Almedina.
- Romano, R. (1985). "Law as a Product: some pieces of the incorporation puzzle." Journal of Law, Economics and Organisation.

- Romano, R. (1996). "Corporate Law and Corporate Governance." Industrial and Corporate Change 5(3).
- Rose, C. (2007). "The new corporate vehicle Societas Europaea: consequences for European Corporate Governance " Corporate Governance Review 15(2): 112-121.
- Rouilleault, H. (2007). "Obligation triennale de négocier, où est-on?" Droit Social(9-10): 988-995.
- Rouilleault, H. (2007). Anticiper et concerter les mutations. Rapport sur l'obligation triennale de négocier, Gouvernement Français - Ministère des Finances.
- Ruigrok, W. and R. v. Tulder (1995). The Logic of International Restructuring, Routledge.
- Ruigrok, W. and R. v. Tulder (1995). The Logic of International Restructuring, Routledge.
- Saenger, I. (1997). "Mehrstimmrechte beim Aktiengesellschaften." ZIP (42): 1813-1821.
- Saintourens, B. (2001). "Les organes de direction de la société anonyme après la loi relative aux nouvelles régulations économiques " Revue des Sociétés 119: 515-533.
- Saintourens, B. (2002). "Les dispositions du décret du 3 mai 2002 relatives aux organes de directions de la société anonyme." Revue des Sociétés 120: 430-440.
- Schäfer, K. (2005). "Die Binnenhaftung von Vorstand und Aufsichtsrat nach der Renovierung durch das UMAG." Zeitschrift für Wirtschaftsrecht 26(29): 1253-1259.
- Schaub, G. (1996). Arbeitsrechtshandbuch - systematische darstellung und nachschlagewerk für die praxis, C.H Beck.
- Schaub, G. (1996). Arbeitsrechtshandbuch - systematische darstellung und nachschlagewerk für die praxis, C.H Beck.
- Schilling, F. (2001). "Corporate Governance in Germany: the move to shareholder value." Corporate Governance 9(3): 148-151.
- Schmidt, H., J. Drukarczyk, et al. (1997). Corporate Governance in Germany. Baden-Baden, Nomos Verlagsgesellschaft.
- Schmidt, J. (2006). "Stimmrechtsvertretung und stimmrechtsansübung "in absentia" in Deutschland und Großbritannien - speziell von der Hintergrund der aktuellen Gesellschaftsrechtsreform in Großbritannien sowie der geplanten EU-Aktionärsrechte-Richtlinie." Neue Zeitschrift für Gesellschaftsrecht(13): 487 ff.
- Schmidt, J. (2007). "German Company Law Reform: makeover for the GmbH, a new mini-GmbH and some important news for the AG " International and Comparative Corporate Law Journal 18(9): 306-311.
- Schmidt, K. (2002). Gesellschaftsrecht, Carl Heymanns
- Schmidt, K. (2002). Gesellschaftsrecht, Carl Heymanns
- Schnabel, C. (1998). The reform of collective bargaining in Germany: corporatist stability vs firm flexibility. The German Model of Industrial Relations between Adaptation and Erosion. R. Hoffman, O. Jacobi, B. Keller and M. Weiss. Düsseldorf.
- Schneider, U. H. (2006). Corporate Governance Issues in Germany - Between Golden October and Nasty November Corporate Governance Post-Enron. Comparative and International

- Perspectives J. Norton, J. Rickford and J. Kleineman, British Institute of International and Comparative Law.
- Schneider, U. H. (2006). Corporate Governance Issues in Germany - Between Golden October and Nasty November Corporate Governance Post-Enron. Comparative and International Perspectives J. Norton, J. Rickford and J. Kleineman, British Institute of International and Comparative Law.
- Schwark, E. (2002). Corporate Governance: Vorstand und Aufsichtsrat. Corporate Governance. P. Hommelhoff, M. Lutter, K. Schmidt, W. Schön and P. Ulmer. Heidelberg, Recht und Wirtschaft: 77-118.
- Sciarra, S. (2004). The Evolving Structure of Collective Bargaining in Europe 1990-2004. Florence, University of Florence, European Commission.
- Sealy, L. and S. Worthington (2008). Cases and Materials in Company Law, Oxford University Press.
- Seifert, H. and H. Massa-Wirth (2005). "Pacts for employment and competitiveness in Germany." Industrial Relations Journal **36**(3): 217-240.
- Seitz, K. (2004). Europäisches Rahmenrecht für eine Europäische Betriebsverfassung - stand und perspectiven. Tübingen, Köhler-Druck.
- Sheehan, B. (2000). "Partnership Agreements may Point the Way Forward." from <http://www.eurofound.europa.eu/eiro/2000/01/feature/ie0001204f.htm>.
- Siems, M. M. (2008). Convergence in shareholder law, Cambridge.
- Siems, M. M. and P. P. Lele (2007). "Shareholder protection - a leximetric approach." Jornal of Corporate Law Studies **7**: 17-50.
- Silva, A. S., António Vitorino, et al. (2006). Livro Branco sobre Corporate Governance em Portugal, Instituto Português de Corporate Governance.
- Simon, H. A. (1991). "Organisations and Markets." Journal of Economic Perspectives **5**(2): 25-44.
- Slinger, G. and S. Deakin (1999). Company Law as an instrument of inclusion: re-regulating stakeholder relations in the context of takeovers, ESRC Centre for Business Research, University of Cambridge.
- Slinger, G. and S. Deakin (1999). Company Law as an instrument of inclusion: re-regulating stakeholder relations in the context of takeovers, ESRC Centre for Business Research, University of Cambridge.
- Social, M. d. T. e. d. S. (2008). Livro Branco sobre as Relações Laborais.
- Social, M. d. T. e. d. S. (2008). Livro Branco sobre as Relações Laborais.
- Solomon, R. (1999). The transformation of the world economy, Macmillan.
- Souriac, M.-A. (2004). "L'articulation des niveaux de négociation." Droit Social(6): 579-590.
- Souriac, M.-A. (2009). "Les réformes de la negociation collective " Revue de Droit du Travail(1): 14-23.

- Steele, M. T. (2007). "Judicial scrutiny of fiduciary duties in Delaware limited partnerships and limited liability companies." Delaware Journal of Corporate Law **32**: 1-32.
- Stevenson, J. E. (2002). "Auditor Independence: A Comparative Descriptive Study of the UK, France and Italy
- Stevenson, J. E. (2002). "Auditor Independence: A Comparative Descriptive Study of the UK, France and Italy
- Stockhammer, E. (2007). "Charakteristika eines finanz-dominierten Akkumulationsregimes in Europa." WSI-Mitteilungen **60**(12): 643-649.
- Streeck, W. and B. Rehder (2003). Der Flächentarifvertrag: Krise, Stabilität und Wandel Max Planck Institute für Gesellschaftsforschung.
- Tamajo, R. d. L. (2007). "Diritto del lavoro e decentramento produttivo in una prospettiva comparata: scenari e strumenti." Rivista Italiana di Diritto del Lavoro(I): 3-29.
- Taylor, P., C. Baldry, et al. (2007). The Information and Consultation of Employees Regulations: an Analysis of their Effectiveness in Relation to Corporate Restructuring and Redundancy, Amicus.
- Teller, M. (2007). "L'information des sociétés cotées et non cotées: une évolution certaine, de nouveaux risques probables." Revue Trimestrielle de Droit Commerciale: 17 ff.
- Terry, M. (1999). "Assessing the significance of partnership agreements." from <http://www.eurofound.europa.eu/eiro/1999/07/feature/uk9907214f.htm>.
- Teubner, G. (1982). Reflexive Rationalität des Rechts. Working Papers. Florence, European University Institute.
- Teubner, G. (2004). Netzwerk als Vertragsverbund, Nomos.
- Teyssié, B. (2009). "A propos de la rénovation de la démocratie sociale." Droit Social(6): 627-629.
- Tiberghien, Y. (2007). Entrepreneurial States. Reforming Corporate Governance in France, Japan and Korea, Cornell University Press
- Tiberghien, Y. (2007). Entrepreneurial States. Reforming Corporate Governance in France, Japan and Korea, Cornell University Press
- Tierry, D. and C. Sauret (1990). La gestion prévisionnelle des emplois et des compétences, L'Harmattan.
- Trefil, B. (2003). Die Niederlassungsfreiheit für Gesellschaften in der Rechtsprechung des EuGH und ihre Auswirkungen auf nationales Recht Law Working Papers. Florence, European University Institute.
- Trefil, B. (2003). Die Niederlassungsfreiheit für Gesellschaften in der Rechtsprechung des EuGH und ihre Auswirkungen auf nationales Recht Law Working Papers. Florence, European University Institute.
- Tricker, B. (1998). "The role of the institutional investor in Corporate Governance." Corporate Governance **6**(4): 213-216.
- University of Massachusetts.
- University of Massachusetts.

- Urbain-Parléani, I. (2003). "Les nouvelles obligations d'information des dirigeants envers les actionnaires." Revue des Sociétés **121**: 779-793.
- Urbain-Parléani, I. (2003). "Les nouvelles obligations d'information des dirigeants envers les actionnaires." Revue des Sociétés **121**: 779-793.
- Valuet, J.-P. (2001). "Identification et vote des actionnaires non résidents des sociétés cotées." Revue des Sociétés **119**(571-581).
- Valuet, J.-P. (2001). "Identification et vote des actionnaires non résidents des sociétés cotées." Revue des Sociétés **119**(571-581).
- Valuet, J.-P. (2002). "Les dispositions du décret du 3 mai 2002 relatives à l'identification et au vote des actionnaires non résidents des sociétés cotées." Revue des Sociétés **120**.
- Van der Berghe, L., C. Van der Elst, et al., Eds. (2002). Corporate Governance in a Globalising World: convergence or divergence? A European perspective, Kluwer.
- Van der Berghe, L., C. Van der Elst, et al., Eds. (2002). Corporate Governance in a Globalising World: convergence or divergence? A European perspective, Kluwer.
- Vanderloo, J. C. (2004). "Encouraging corporate governance for the closely held business." Mississippi College School of Law Review **24**: 39-48.
- Vendeuil, S. d. (2001). "NRE et dissociation des fonctions du président du conseil et directeur général." JCP E: 1315.
- Verdier, J.-M. (1983). "La présence syndicale dans l'entreprise et la loi du 28 octobre 1982 relative au développement des institutions représentatives du personnel." Droit Social(1): 37-54.
- Verkindt, P.-Y. (2009). "Les élections professionnelles dans l'entreprise." Droit Social(6): 648-657.
- Viandier, A. (2008). "L'administrateur indépendant des sociétés cotées." RJDA: 599.
- Viswanathan, A. (2007). "The Companies Act 2006: towards shareholder engagement and streamlining the decision-making process " International Company and Commercial Law Review **18**(6): 199-202.
- Viswanathan, A. (2007). "The Companies Act 2006: towards shareholder engagement and streamlining the decision-making process " International Company and Commercial Law Review **18**(6): 199-202.
- Vivien, P. (2007). "Quelques réflexions sur la mise en oeuvre de la GPEC." Droit Social: 1093-1094.
- Vredeling, H. and R. Blainpain (1983). The Vredeling proposal : information and consultation of employees in multinational enterprises, Kluwer.
- Waas, B. (2007). Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives - Germany Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives. R. Blainpain, Kluwer: 17-41.
- Wand, P. (2006). "EU-Richtlinienvorschlag zur Erleichterung der Ausübung von aktionärsrechten." Der Aktiengesellschaft **51**(12): 443-450.

- Wendeling-Schröder, U. (2005). Auf der Suche nach einem modernen Tarifvertragsrecht. Arbeitsrecht im sozialen Dialog - Festschrift für Hellmut Wissmann zum 65. Geburtstag. W. Kohte, H.-J. Dörner and R. Anzinger. München, C.H. Beck: 174-184.
- West, M. D. (2002). Legal determinants of World Cup success, Michigan Law and Economics Research Paper
- White, E. (2006). Bubbles and busts: the 1990s and the 1920s. The Global Economy in the 1990s. A Long Run Perspective. P. W. Rhode and G. Toniolo, Cambridge.
- Williamson, O. E. (2003). "Examining economic organisation through the lens of contract." Industrial and Corporate Change **12**: 917-942.
- Windbichler, C. (2002). Der Gemeinsinn der juristischen Person. Grossunternehmen zwischen Shareholder-value, Mitbestimmung und Gemeinwohl Gemeinwohl und Gemeinsinn im Recht. H. Münkler and K. Fischer, Akademie Verlag: 165-179.
- Wirtz, P. (2001). The changing institutions of governance in Corporate France: what drives the process?, FARGO - Centre de Recherche en Finance, Architecture et Gouvernance des Organisations.
- Wirtz, P. (2001). The changing institutions of governance in Corporate France: what drives the process?, FARGO - Centre de Recherche en Finance, Architecture et Gouvernance des Organisations
- Wirtz, P. (2001). The changing institutions of governance in Corporate France: what drives the process?, FARGO - Centre de Recherche en Finance, Architecture et Gouvernance des Organisations.
- Witte, B. d. (2005). The Trajectory of Fundamental Social Rights in the European Union. Social Rights in Europe. G. De Búrca and B. d. Witte, Oxford.
- Witte, B. d. (2005). The Trajectory of Fundamental Social Rights in the European Union. Social Rights in Europe. G. De Búrca and B. d. Witte, Oxford.
- Womack, J. P. and D. Jones (1996). Lean thinking: banish waste and create wealth in your corporation, Simon & Schuster.
- Wood, S. (2000). From voluntarism to partnership: a third way overview of the public policy debate in British industrial relations. Legal Regulation of the Employment Relation. H. Collins, P. L. Davies and R. Rideout, Kluwer Law International.
- Wouters, J. (2000). "European Company Law: quo vadis." Common Market Law Review **37**: 257-307.
- Wymeersch, E. (2002). Convergence or divergence in Corporate Governance patterns in Western Europe. Corporate Governance Regimes - convergence and diversity. J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneboog, Oxford.
- Zachert, U. (1996). "Krise des Flächentarifvertrages?" Recht der Arbeit **49**(3): 140-151.
- Zachert, U. (1996). "Krise des Flächentarifvertrages?" Recht der Arbeit **49**(3): 140-151.
- Zachert, U. (1996). "Krise für den Flächentarifvertrag? Herausforderungen für das Tarifrecht." Recht der Arbeit: 140-151.
- Zachert, U. (2005). Dezentralisierung des Tarifvertrages: der einzelne Arbeitgeber als Tarifpartei Arbeitsrecht im sozialen Dialog - Festschrift für Hellmut Wissmann zum 65. Geburtstag. W. Kohte, H.-J. Dörner and R. Anzinger. München, C.H. Beck: 201-212.

- Zorzi, A. (2004). Reti di imprese e modelli societari di coordinamento. Reti di imprese tra regolazione e norme sociali. F. Cafaggi, Il Mulino.
- Zumbansen, P. (2007). Varieties of Capitalism and the Learning Firm: Corporate Governance and Labour in the Context of Contemporary Developments in European and German Company Law. U. o. C. Centre for Business Research.
- Zumbansen, P. (2007). Varieties of Capitalism and the Learning Firm: Corporate Governance and Labour in the Context of Contemporary Developments in European and German Company Law. U. o. C. Centre for Business Research.